88- 1710

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

NORTHWEST FOREST RESOURCE COUNCIL,

Petitioner,

v.

PORTLAND AUDUBON SOCIETY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a substantial and direct economic stake in the outcome of a case a sufficient "protectable interest" to justify intervention as of right, pursuant to Federal Rule of Civil Procedure 24(a)(2), for purposes of defending a federal project against challenges under the National Environmental Policy Act?

2. Must an applicant for intervention as of right satisfy the "standing" requirement of Article III of the United States Constitution as well as the "interest" requirement of Federal Rule Of Civil Procedure 24(a)(2)?

PARTIES BELOW

The following is a complete list of the parties named in the proceedings below.

Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, The Wilderness Society, Sierra Club, Siskiyou Audubon Society, Central Oregon Audubon Society, Salem Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon Society, and Natural Resources Defense Council, Inc., as plaintiffs-appellees and as plaintiffs-appellants below.

Donald Hodel, in his official capacity as Secretary, United States Department of Interior, as defendant-appellee below.

Northwest Forest Resource Council, Huffman and Wright Logging Company, Freres Lumber Company, Inc., Lone Rock Timber Company, Inc., Scott Timber Company, Clear Lumber Manufacturing Corp., Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., and Cornett Lumber Company, Inc., as defendants-intervenors-appellants below.

Northwest Forest Resource Council, Association of O & C Counties, and Benton County, as defendants-intervenors-appellees below.

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No. _____

In The

Supreme Court of the United States

October Term, 1988

NORTHWEST FOREST RESOURCE COUNCIL,

Petitioner,

v.

PORTLAND AUDUBON SOCIETY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Northwest Forest Resource Council, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding on January 24, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears as *Portland Audubon Society v. Hodel* and is reported at 866 F.2d 302 (9th Cir. 1989). This opinion is reproduced in the appendix hereto. Appendix A at A-1.

The unpublished rulings of the United States Magistrate and the United States District Court for the District of Oregon are also reproduced in the appendix, Appendices B-E at A-19 - A-49.

JURISDICTION

Judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 24, 1989, denying petitioner's motion to intervene for issues related to the National Environmental Policy Act (NEPA). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) which allows this Court to be petitioned for writ of certiorari after judgment of a court of appeals in any civil case.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Article III of the United States Constitution provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;-to all cases affecting ambassadors, other public ministers and consuls;-to all cases of admiralty and maritime jurisdiction;-to controversies to which the United States shall be a party;-to controversies between two or more States;-between a State and citizens of another State;-between citizens of different States;-between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."

Federal Rule of Civil Procedure 24(a) provides:

> "Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

The relevant portions of the National Environmental Policy Act, 16 U.S.C. § 4321, *et seq.*, which are cited in part in the Reasons for Granting the Writ, are reproduced in full in the Appendix hereto, Appendix F at A-50 - A-55.

STATEMENT OF THE CASE

At the outset of this action, the Oregon Director of the Bureau of Land Management (BLM) was in the process of selling timber harvesting rights for a number of government tracts of old growth fir trees. Respondent environmental groups opposed the harvesting of old growth fir and sued in the Oregon Federal District Court to enjoin the sale and logging of the BLM tracts. Respondent environmental groups claimed that the logging of old growth fir trees would destroy the habitat of the Northern Spotted Owl and threaten the species with extinction.

The respondent environmental groups' complaint sought declaratory and injunctive relief based upon alleged deficiencies of the BLM logging plan in violation

of (NEPA), 42 U.S.C. §§ 4321-70, the Oregon and California Lands Act, 43 U.S.C. § 1181, the Federal Land Policy Act, 43 U.S.C. § § 1701-84, and the Migratory Bird Treaty Act, 16 U.S.C. § § 703-12. (Respondent did not invoke the Endangered Species Act because the Northern Spotted Owl had not been identified as either a threatened or endangered species under that act).

Among others, petitioner, Northwest Forest Resource Council, sought to intervene in the case as of right under Federal Rule of Civil Procedure 24(a)(2) in support of the government. Petitioner represented almost all of the private timber companies which had bid or would bid on the timber sales which respondent environmental groups had moved to enjoin. Respondent sought an injunction to halt all timber sales that involved Douglas fir trees more than 200 years old and growing within 2.1 miles of any spotted owl habitat.

The District Court ultimately dismissed the case for lack of jurisdiction and failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The court also denied petitioner the right to intervene with respect to any NEPA claim for lack of protectable interest, although petitioner was allowed to intervene for all other purposes. Appendix C at A-29 - A-30.

Both petitioner, Northwest Forest Resource Council, and respondent environmental groups appealed the District Court's ruling to the Ninth Circuit Court of Appeals. In its January 24, 1989, judgment the Ninth Circuit ruled that it could not make a determination on the jurisdiction issue without a factual trial. The court also ruled that

notwithstanding the fact that petitioner had an undisputed economic interest in ensuring a continued supply of timber from BLM lands, petitioner's claim had "no relation to the interests intended to be protected by the statute at issue – in this case, NEPA." Appendix A at A-18. The Ninth Circuit reversed the District Court's judgment dismissing the action and remanded for further proceedings and affirmed the District Court's denial by petitioner's motion to intervene as defendant on the NEPA claims. Appendix A at A-18.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S "PROTECTABLE INTEREST" DOCTRINE EXTENDS THE REQUIREMENTS OF INTERVENTION AS OF RIGHT BEYOND THE LIMITS OF FEDERAL RULE OF CIVIL PROCEDURE 24(A)(2) AND RAISES THE INTERVENTION STANDARD TO THE LEVEL OF STANDING REQUIRED UNDER ARTICLE III IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

The Ninth Circuit's doctrine that an applicant for intervention as of right, under Federal Rule of Civil Procedure 24(a)(2), must claim the same interest as the statute at issue is intended to protect in order to secure a protectable interest establishes the following compelling reasons for granting the writ: (a) the doctrine creates a conflict with decisions of this Court and other circuits, (b) the doctrine improperly equates standing requirements with intervention requirements which raises important and unresolved questions, and (c) the doctrine denies

applicant the ability to protect economic and other vital interests from the injury caused by the statute at issue in the litigation.

The Ninth Circuit has held that where an applicant for intervention has a "significant economic stake in the outcome of plaintiffs' case" the applicant, nevertheless, has no "protectable interest" unless the federal statute at issue is one that directly provides for the protection of the applicant's economic interest. Appendix A at A-18. In contrast, the Tenth Circuit and this Court have ruled that such a direct interest is not required for intervention as of right.

In the present case, the original plaintiffs (respondent environmental groups) challenged certain imminent government timber sales on claim of inadequate environmental review under NEPA. Petitioner, Northwest Forest Resource Council, moved to intervene as of right, on the side of the government, to protect itself not only from present disruptions but also from future disruptions in timber supplies which would follow from an adverse ruling on the NEPA claims. The court determined that "because no one denies that they have an economic interest in ensuring a continued supply of timber from BLM lands" the only question was whether petitioner had satisfied the second prong of the intervention test, the "interest" requirement. Appendix A at A-15. To answer that question, the Ninth Circuit cited the Seventh Circuit decision in *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982), for the proposition that the petitioner's interest must be a "direct, legally protectable interest in the property or transaction." Appendix A at A-16. The Ninth Circuit applied this proposition to petitioner and found its undisputed economic interest had no direct "relation

to the interests intended to be protected" by NEPA and concluded, therefore, that petitioner did not have a sufficient "protectable interest" to warrant intervention. Appendix A at A-18. This judgment conflicts with the decisions of other circuits.

Under similar circumstances the Tenth Circuit has ruled differently. In the case of *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 578 F.2d 1341 (10th Cir. 1978), that circuit had to consider a motion by the American Mining Congress and Kerr-McGee Nuclear Corporation to intervene as of right in an action which also involved NEPA claims. Environmental groups sought injunctive and declaratory relief to stop the government from issuing a license to United Nuclear for the operation of a uranium mill without first preparing an environmental impact statement. The applicants for intervention were potential recipients of similar licenses and Kerr-McGee had an application pending. The Tenth Circuit found that a decision in favor of plaintiffs could have a substantial effect on the applicants and that satisfied the interest test. *Id.* at 1344. The court also noted, contrary to the Ninth Circuit analysis in the present case, that the question of impairment is not separate from the question of interest. *Id.* at 1345. The Tenth Circuit considered the protectable interest question only in the context of the practical impairment the applicants would suffer from an adverse outcome in the case. The Ninth Circuit, on the other hand, addressed petitioner's interests in complete isolation from such effects.

The contrast that exists between the Ninth Circuit and the Tenth Circuit on the same "protectable interest" issue is like night and day. Both cases were based on NEPA claims. Both applicants supported the government

against the plaintiff environmental groups. Both applicants had a significant economic stake in the outcome of the case. Both applicants sought to protect their economic interests. Both would suffer substantially from the potential impact of an adverse decision in the case. And although petitioner, Northwest Forest Resource Council, had a direct interest in the present Ninth Circuit case by virtue of its members bidding on the challenged timber sales, whereas the applicants in the Tenth Circuit case did not have a direct interest in the challenged license, the Ninth Circuit found no protectable interest and the Tenth Circuit did. This divergence of views on what interest is necessary for intervention under Federal Rule of Civil Procedure 24(a)(2) has created a direct conflict between the circuits.

Moreover, the Tenth Circuit suggested in *Natural Resources* that a ruling, contrary to its own, which would require a direct interest pursuant to the statute sued under, for intervention as of right, would conflict with United States Supreme Court precedent. Specifically, the Court stated:

> "*Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135-36, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967), held that the interest claimed by the applicant in intervention did not have to be a direct interest in the property or transaction at issue provided that it was an interest that would be impaired by the outcome. There Cascade's source of supply would have been a new company created by an antitrust divestiture, a significant change. In view of this consequence of the litigation, it was held that Cascade had a sufficient interest." *Id.* at 1344.

The Ninth Circuit in the present case has not only required the claimed interest to be a direct interest in the case but also a direct interest in the specific issue in which the applicant seeks to participate. Petitioner does have an interest in the particular timber sales at issue in this case but it lacks, in the appellate court's view, a direct interest in what NEPA was intended to protect – presumably, the environment. Although the appellate court declares not to have incorporated an independent standing inquiry into its intervention test, Appendix A at A-15 n.1, this Ninth Circuit doctrine, that the applicant's interest must be the same as that protected by the statute at issue, equates the intervention requirements of the Federal Rules of Civil Procedure with the standing requirements of Article III of the United States Constitution and creates still more conflicts.

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982), makes it clear that Article III standing requires an injury with a nexus to the substantive character of the statute or regulation at issue. But this is exactly the standard the Ninth Circuit has espoused for intervention.

In the case of *Diamond v. Charles*, 476 U.S. 54 (1986), this Court did not have to decide whether a party seeking to intervene before a District Court must satisfy both the requirements of Rule 24(a)(2) and Article III, but this Court did note that the question "has led to anomalous decisions in the Courts of Appeals." *Diamond*, 476 U.S. at 69. In a footnote, Justice Blackmun, writing for the majority, stated:

> "The Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of

> right must himself possess standing. Compare *United States v. 39.36 Acres of Land*, 754 F2d 855, 859 (CA7 1985) (intervention requires an interest in excess of that required for standing) . . . with *Southern Christian Leadership Conference v. Kelly*, 241 App DC 340, 747 F2d 777 (1984) (equating interest necessary to intervene with interest necessary to confer standing), and *United States v. American Tel. & Tel. Co.*, 206 App DC 317, 642 F2d 1285 (1980) (intervention is proper only if the would-be intervenor has an interest in the outcome of the suit different from that of the public as a whole), with *Sagebrush Rebellion, Inc. v. Watt*, 713 F2d 525 (CA9 1983) (resolving intervention questions without reference to standing doctrine) and *Planned Parenthood of Minnesota, Inc. v. Citizens of Community Action*, 558 F2d 861 (CA8 1977) (same)." *Id.* at 62 n.21.

The varying views among the Courts of Appeals become even more diverse when the Tenth Circuit's opinion in *Natural Resources* is added to the list. Surely the time has come for this Court to resolve these conflicts and clear up this confusion.

The differing views among the circuits alone creates a serious problem of national consequence. Justice is dispensed based on geographic location rather than on reasoned principles of fairness and a national norm. The varying views are also in a state of flux. Witness the backpedaling of the Ninth Circuit in the present case. The court said one thing and did another. It cited its previous holding in *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980), for the following then ignored the prior precedent.

> "We have rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest. . . . We agree with the D.C. Circuit that 'the "interest" test is

> primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.' . . . The 'interest test' is basically a threshold one, rather than the determinative criterion for intervention, because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene." *Id.* at 438.

The court's decision in the present case has turned these words into meaningless rhetoric. The Ninth Circuit opinion analyzed petitioner's interest in a vacuum. There was no analysis on the practical harm to petitioner or the adequacy of representation. Nor did the court look to efficiency or due process. In light of the fact that petitioner was allowed to intervene for all purposes save the NEPA claims, all of these considerations clearly would have dictated a different conclusion than what the Ninth Circuit reached. This type of inconsistency adds to the confusion and undermines our legal system with uncertainty. Only a national standard enunciated by this Court can remedy this problem.

The Ninth Circuit decision in this case (and those like it) is problematic for other reasons as well. The *Portland* decision sets an impossible standard and establishes a precedent dangerous to balanced representation in court. Regardless of actual congressional intent, virtually all federal environmental statutes can be deemed by an activist court (as was NEPA by the Ninth Circuit) to be intended to protect environmental interests to the exclusion of all others. Virtually no one besides the original parties to the case could ever find a protectable interest

no matter how severe the impact. Nor would the potential intervenors have standing to bring a suit elsewhere for the protection of their rights. Industry, the public, and even most governmental entities are effectively barred under this decision from litigating directly to protect their nonenvironmental interests.

Recently, using the same logic as the Ninth Circuit in *Portland*, a federal district judge for the Western District of Washington not only denied timber industry representatives the right to intervene in an endangered species case, but even denied them amicus curiae status. *Northern Spotted Owl v. Hodel*, Civ. No. C88-573Z. Due to the Ninth Circuit ruling, those who would intervene in such cases, if they could, are now subject to the potential of inadequate governmental representation, collusive lawsuits, and the unreasonable demands of single focus special interests. Surely the government cannot be depended upon to defend itself vigorously or even appropriately in all cases. With the exclusion of industry intervenors, government entities have a much greater incentive to acquiesce in a friendly suit or to settle a case adverse to the interests of the regulated community. Nor is this Ninth Circuit decision limited only to environmental cases and economic interests.

This Ninth Circuit decision applies equally well to all cases brought to challenge governmental compliance with federal statutes and all interests not traceable to those statutes (with few if any exceptions). The court's excessive limitation on the right to intervene in such cases seriously impairs effective public interest litigation by denying direct, judicial access to those with the greatest and, usually, only personal stake in such cases. It works

invidiously to cut off the right of those most affected by the outcome of a suit to participate fully, or at all, in the judicial process. Ironically, those who must bear the burden of our societal values as expressed in our laws are summarily denied equal access to the courts. Without this participation, federal judges may not hear, let alone consider, the need to balance the equities in a particular case.

Given these repercussions, there can be no sufficient countervailing policies which would justify the draconian intervention doctrine proffered by the Ninth Circuit in this case.

II

THE DECISION BELOW THAT ECONOMIC INTERESTS HAVE NO RELATION TO THE INTERESTS INTENDED TO BE PROTECTED BY THE STATUTE AT ISSUE – THE NATIONAL ENVIRONMENTAL POLICY ACT – IS IN ERROR

The Ninth Circuit has ruled here that petitioners cannot intervene because they "lack an adequate interest relating to the plaintiffs' NEPA claims where NEPA provides no protection for the purely economic interests that they assert." Appendix A at A-18. Petitioner, Northwest Forest Resource Council, asserts an economic interest in the continued harvesting of forest resources on BLM lands. The court's conclusion that NEPA does not provide protection for this interest is contrary to the clear intent and language of the act.

The Congressional Declaration of Purpose states:

> "The purposes of this chapter are: To declare a national policy which will encourage *productive* and enjoyable harmony between man and his environment . . . ." 42 U.S.C. § 4321 (emphasis added).

The Congressional Declaration of National Environmental Policy states:

> "The Congress . . . declares that it is the continuing policy of the Federal Government . . . to foster and promote the *general welfare*, to create and maintain conditions under which man and nature can exist in *productive* harmony, and fulfill the social, *economic*, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added).

> "[T]o use all practical means . . . to . . . assure for all Americans safe, healthful, *productive*, and esthetically and culturally pleasing surroundings . . . [and] achieve a balance between population and *resource use* which will permit high standards of living and a wide sharing of life's amenities . . . and enhance the quality of *renewable resources* . . . ." 42 U.S.C. § 4331(b) (emphasis added).

Congress has also stated:

> "The Congress authorizes and directs that . . . all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking *along with economic* and technical considerations . . . ." 42 U.S.C. § 4332(b) (emphasis added).

These provisions make it clear that NEPA is intended to protect both environmental and economic interests. The act requires a balancing of these interests. The Ninth Circuit decision undercuts the purpose of NEPA by eliminating potential intervenors who seek to intervene to protect the very economic interests for which the act expressly provides and intends to be protected.

The lower courts, and the regulated community, need guidance from this Court on what constitutes a protectable interest for intervention as of right in NEPA and other environmental cases.

CONCLUSION

The decision below has brought the various Courts of Appeals into conflict with one another and has raised serious questions about the proper standard for establishing a sufficient "protectable interest" to warrant intervention as of right. The impacts of the Ninth Circuit's ruling are pervasive and unnecessarily deprive individuals of their most effective, and sometimes only, means for protecting their interests and livelihoods. For these reasons and those mentioned above, this Court should grant the petitioned writ.

DATED: April, 1989.

Respectfully submitted,

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APPENDIX A

PORTLAND AUDUBON SOCIETY; Headwaters; Lane County Audubon Society; Oregon Natural Resources Council; the Wilderness Society; Sierra Club; Siskiyou Audubon Society; Central Oregon Audubon Society; Salem Audubon Society; Kalmiopsis Audubon Society; Umpqua Valley Audubon Society; Natural Resources Defense Council, Inc., Plaintiffs-Appellees,

v.

Donald HODEL, in his official capacity as Secretary, United States Department of Interior, Defendant,

and

Northwest Forest Resources Council, Defendant-Intervenor-Appellant,

and

Huffman and Wright Logging Company; Freres Lumber Company, Inc.; Lone Rock Timber Company, Inc.; Scott Timber Company; Clear Lumber Manufacturing Corp.; Yoncalla Timber Products, Inc.; and Cornett Lumber Company, Inc., Defendants-Intervenors-Appellants.

PORTLAND AUDUBON SOCIETY; Headwaters; Lane County Audubon Society; Oregon Natural Resources Council; the Wilderness Society; Sierra Club; Siskiyou Audubon Society; Central Oregon Audubon Society; Salem Audubon Society; Kalmiopsis Audubon Society; Umpqua Valley Audubon Society; Natural Resources Defenses Council, Inc., Plaintiffs-Appellants,

v.

Donald HODEL, in his official capacity as Secretary, United States Department of Interior, Defendant-Appellee,

and

Northwest Forest Resources Council; Association of O & C Counties; Benton County, Defendants-Intervenors-Appellees.

Nos. 88-3854, 88-3855 and 88-3787.

United States Court of Appeals
Ninth Circuit.

Argued and Submitted July 19, 1988.
Decided Jan. 24, 1989.

Victor M. Sher, Sierra Club Legal Defense Fund, Inc., Seattle, Wash., Michael Axline, Western Natural Resources Law Clinic, Eugene, Or., for plaintiffs-appellants-cross-appellees.

Martin W. Matzen, Dept. of Justice, Wash., D.C., and Thomas C. Lee, Asst. U.S. Atty., Portland, Or., for defendant-appellee.

Mark C. Rutzick, Preston, Thorgrimson, Ellis & Holman, Portland, Or., for defendants-intervenors-appellees-cross-appellants.

Phillip D. Chadsey, Stoel, Rives, Boley, Jones & Grey, Portland, Or., for defendants-intervenors-appellees.

Appeal from the United States District Court for the District of Oregon.

Before GOODWIN, Chief Judge, SCHROEDER and PREGERSON, Circuit Judges.

GOODWIN, Chief Judge:

Plaintiff environmental groups appeal the dismissal under Fed.R.Civ.P. 12(b)(1) and 12(b)(6) of their action against defendant Donald Hodel, Secretary of Interior, and others. Certain intervenors also challenge the district

court's denial of their motion to intervene on one of the plaintiff's claims. We reverse in part and remand for trial.

The plaintiffs oppose the logging of old-growth fir timber. The Oregon director of the Bureau of Land Management (BLM) is in the process of selling for harvesting a large number of tracts of old-growth timber located in seven management districts. Plaintiffs sued to prevent logging these timber sales. Their main argument is that logging will destroy the habitat of the northern spotted owl, thereby threatening the species with extinction. For the purposes of Rule 12 review, we are required to assume the truth of the alleged facts.

The complaint sought declaratory and injunctive relief based upon the logging plan's alleged violation of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (1982), the Oregon and California Lands Act, 43 U.S.C. § 1181 (1982), the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782 (1982), and the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-12 (1982).

Plaintiffs do not seek relief under the Endangered Species Act because the United States Fish and Wildlife Service has refused to declare the Northern Spotted Owl an endangered species. This refusal has been challenged in other litigations by some of the same plaintiffs. *See Northern Spotted Owl (Strix Occidentalis Caurina) v. Donald Hodel*, ___ F.Supp. ___, (W.D. Wash. No. C88-573Z, November 17, 1988).

Plaintiffs seek an injunction to halt all timber sales that included old-growth Douglas fir trees more than 200 years old and growing within 2.1 miles of known spotted owl habitat sites. Maps of proposed timber sales reveal

that some 289 of the old-growth fir timber stands offered for sale fall within the requested injunction.

The Northwest Forest Resources Council (NFRC), eight Oregon counties, and various individual contractors (the Huffman & Wright Group) were allowed to intervene as defendants with respect to certain of the plaintiffs' claims.

While this appeal has been pending, we granted in part the plaintiffs' emergency motion for a temporary injunction. During the summer of 1988, selected logging operations were allowed to continue, but the logging of several other sales was enjoined. The question that remains to be decided is whether plaintiffs can continue this litigation.

Statutory Withdrawal of Jurisdiction

The district court held that section 314 of the 1988 continuing budget resolution withdrew the court's jurisdiction to consider the plaintiff's claim.

Section 314 provides:

> The Forest Service and Bureau of Land Management are to continue to complete as expeditiously as possible development of their respective Forest Land and Resource Management Plans to meet all applicable statutory requirements. Notwithstanding the date in section 6(c) of the NFMA (16 U.S.C. 1600), the Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending the completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however,* That there shall be no challenges to

> any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further,* That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

Continuing Resolution, H.J.Res. 395, § 314, Pub.L. No. 100-202, 101 Stat. 1329-254, 133 Cong.Rec. H 12468 (daily ed. Dec. 21, 1987) (emphasis added). (The above section was reenacted without change as H.R. 4867 and signed by the President on September 27, 1988, and is now found in Pub.L. No. 100-446).

The plaintiffs argue that the quoted section of the continuing resolution does not withdraw jurisdiction to hear this case. The section purports in one sentence to take away the jurisdiction of the district courts to hear challenges to "existing plans", while in a following sentence providing "further that any and all particular activities to be carried out under existing plans may nevertheless be challenged." The trial court interpreted this extraordinary language as a clear withdrawal of jurisdiction. We find it anything but clear.

Plaintiffs argue in effect that each sale which includes spotted owl habitat is a "particular activity" subject to challenge. Defendants argue, on the other hand, that each of the seven regional "existing plans" is a comprehensive and carefully coordinated management plan of scheduled sales preceded in each of the seven districts by environmental impact statements, and, by express legislative intent, made immune from challenge.

The management plans are designed to provide a steady flow of old growth timber from the federal inventory to the sawmills and other manufacturers in the Oregon counties containing BLM old growth timber. Defendants argue that the challenge of virtually all of the planned sales under the guise of challenging "particular activities" is a transparent effort to avoid the clear intent of section 314 by nibbling away at the management plans, sale by sale.

The sales are indeed separate transactions. They are also part of an existing plan of disposal of federal timber in the region. Thereby hangs the problem in this case.

"We begin with the strong presumption that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670, 106 S.Ct. 2133, 2135, 90 L.Ed.2d 623 (1986); *see Love v. Thomas*, 858 F.2d 1347 (9th Cir.1988) (observing that "we construe prohibitions against judicial review narrowly"). *See Moapa Band of Paiute Indians v. United States Dep't of Interior*, 747 F.2d 563, 565 (9th Cir.1984) (observing that "[p]reclusion of judicial review . . . usually will not be found absent a clear command of the statute").

The language in section 314 upon which the district court relied is "that there shall be no challenges to any existing plan . . . solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan. . . ." Here the key words seem to be "solely" and "information available subsequent to the completion of the existing plan."

The plan to sell substantially all the marketable old growth fir timber remaining under BLM management was an "existing plan" when this litigation was commenced. The environmental implications of the plan had been fully studied between 1979 and 1983. The studies had evaluated the impact upon wildlife, including owls. It was and is no secret that the northern spotted owl disappears when its habitat is destroyed by logging. The plan was nonetheless approved and was being executed. This litigation threatened to delay the proposed sales, at considerable expense to the impacted counties, industrial purchasers, and the communities that rely upon the timber industry for their livelihood.

The defendants went to their senators and representatives, and section 314 was the result. The environmental impact studies made in 1983 during the preparation of the plan had not been challenged in court. They had been challenged in administrative proceedings. After the sales were advertised in 1987, the plaintiffs discovered more information about the northern spotted owl. Bird experts generally agreed that the continued logging of old growth fir would probably exterminate the species in the logged off areas. The owl habitat problem had been treated in the impact statements, but had not been deemed by the BLM to be a sufficient reason to abort the plan. New information generated both inside and outside the federal government reinforced the plaintiffs' opposition to the timber sales, but did not cause the BLM to change its position.

There is little doubt about the intent of the sponsors of section 314. The sponsors intended to stop this particular lawsuit and to permit the sales to go forward without

further delay. It is equally clear that the plaintiffs intended to stop the logging, by any legal means available. Actual "legislative" intent of congressional sponsors is not seriously debated in this case.

The legal problem that the court faces is to determine whether, following principled methods of statutory construction, Congress expressed the intent of the section's sponsors in such a way as to withdraw the jurisdiction of the district court to try this lawsuit.

The district court characterized this action as an action brought "on the sole basis of new information concerning the northern spotted owl." The plaintiffs argue that the district court erred in characterizing a "sole basis" because the court did not take account of a number of other theories relied upon by the plaintiffs.

Plaintiffs allege that new information shows a violation of the Migratory Bird Treaty Act. The district court did not refer to this statute in holding that plaintiffs' claim is based upon "information available subsequent" to the completion of the existing plan. That holding solves only part of the problem.

For example, plaintiffs contend that the logging will constitute a taking of habitat and thus a taking of protected birds under the Act. Plaintiffs say that this migratory bird claim does not depend upon "new information." We express no opinion on the merits of this argument. The district court has not yet considered it. But a claim somewhat similarly framed was recently recognized as at least reviewable in *Palila v. Hawaii Dept. of Land*, 852 F.2d 1106 (9th Cir.1988) (finch-billed Palila habitat harmed by grazing sheep).

The plaintiffs also challenge the Secretary's interpretation of the Oregon and California Lands Act (OCLA). Because they challenge decisions about owl habitat made before the plans at issue were adopted, that part of the claim does not appear to be based on new information, and therefore, whatever its merits, is not subject to Rule 12(b) dismissal on its face as being based on new information.

Contrary to the district court's conclusion, the plaintiffs' complaint does not allege "that the plan in its entirety is outdated" or "solely . . . that the plan does not incorporate information available subsequent to the completion of the existing plan." Section 314. Instead, the plaintiffs seek, on a variety of grounds, to enjoin specific timber sales that have been authorized pursuant to the plans. It is true that the complaint relies on information published after the "existing plan" was completed. However, fairly construed, the complaint does not rely solely upon new information.

The plaintiffs contend that the controlling language of section 314 is that "[n]othing shall limit judicial review of particular activities on these lands" and that "any and all particular activities to be carried out under existing plans may . . . be challenged." *Id.* The district court has not yet passed upon the question whether timber sales are "particular activities".

The defendants argue that because the plaintiffs seek to enjoin every planned sale that includes old-growth timber within a 2.1-mile radius of an owl habitat, the attack is essentially an attack on the whole plan. It does have that effect. The plaintiffs argue, however, that the

challenge of a number of particular sales is a challenge of "particular activities," the right to which is guaranteed by the express terms of the statute. With this set of competing views of the language of the statute as applied to the more or less undisputed facts, the district court opted to end the case by the first door out – resort to the "sole basis" clause. It is not that easy.

Legislative History

The defendants point to fragments of the legislative history of section 314 that indicate that Congress intended to preclude judicial review in this very case. *See Block v. Community Nutrition Institute*, 467 U.S. 340, 345, 104 S.Ct. 2450, 2453-2454, 81 L.Ed.2d 270 (1984) (stating that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved"). Parts of the legislative history, such as comments by individual sponsors and committee reports, support the defendants' claim.

There is no doubt that the BLM has been instructed to sell, and that the logging industry desires to buy, as much old growth fir timber as can be reached by existing technology. The record contains abundant evidence of local Congressional support for the marketing plan. However, expressions of individual legislators' intent do not necessarily prove congressional intent. See *TVA v. Hill*, 437 U.S. 153, 189-191, 98 S.Ct. 2279, 2299-2300,

57 L.Ed.2d 117 (1978). Substantial doubt about the congressional intent exists.

The district court opinion quoted from and relied on the Senate committee report. We have examined that report, and also the conference report.

The conference committee report explains changes to the Senate report and says the statute means that "existing plans may not be challenged solely on the basis that the plans are outdated or that there is new information, *unless the claim includes information as to substantive concerns related to the new information. Any particular activities, such as individual timber sales, may continue to be challenged as always.*" Conference Report No. 498, 100th Cong., 1st Sess. at 925 (emphasis added). This language tends to support the plaintiffs.

The plaintiffs assert that their newly discovered information about the loss of habitat and the resulting loss of bird population is a substantive concern. The district court has only indirectly passed upon this question. The plaintiffs also argue that they are not challenging the marketing plan solely on the basis of the alleged obsolescence of the 1983 environmental studies nor solely on the acquisition of new information, but on the additional ground that the plan violates a number of other specific statutory provisions. When looking at the complaint as a whole it is difficult to avoid the conclusion that it challenges particular sales (activities) on grounds that remain available under the express terms of the very statute upon which the defendants rely. Accordingly, we must hold that the Section 314 savings clauses require the

district court to decide how to apply the law to particular sales.

Express or Implied Repeal

Section 314 precludes resort to the judicial review provisions of the Administrative Procedure Act for challenges to the existing plan solely on the basis that the plan does not incorporate new information. The only way to find further elements of plaintiffs' claims precluded would be if section 314 had repealed the relevant statutes as they apply to the entire subject of the litigation.

Plaintiffs characterize defendants as arguing, in effect, that section 314 brought about either the express or implied repeal of the judicial review provisions of the Administrative Procedure Act as applied to the Oregon BLM timber sales plans. Section 314 does not use the word "repeal" and mentions no other statutes. Obviously there can be no express repeal without reference to the "repealed" statute. *Sutherland Stat. Const.* § 23.07 (4th ed.).

If the defendants were to fall back to an argument that there is an implied repeal of NEPA, the Migratory Bird Act, and other statutes as they may pertain to judicial review of timber sales under the challenged plans, the implied repeal argument would run afoul of *TVA v. Hill, supra*. That case squarely rejected a contention that a continuing appropriation for a dam constituted an implied repeal of the Endangered Species Act as it related to construction of the Tellico Dam. Nothing in Section 314 implies the repeal of any law.

In attempting to distinguish *TVA v. Hill* and the entire question of implied repeal, the defendants claim that in *TVA v. Hill*, unlike our case, no statutory language whatsoever exempted the dam project from the requirements of the Endangered Species Act; only legislative history called for such exemption. Defendants also assert that the Supreme Court's opinion leaves no room for doubt that the Court would have sustained the exemption *if* the exemption could have been found in the words of the statute. 437 U.S. at 189-191, 195, 98 S.Ct. at 2299-2300, 2302. That may be true. But the statute before us contains no words that exempt timber sales from challenge. The statute merely precludes judicial review when the only basis upon which the plaintiffs seek review is that the plan did not incorporate newly discovered information (about owls) not available to the BLM when the plan was adopted.

At a trial, both sides may be able to show that owl habitat degradation was known before or after the plan was adopted. Such proof would shed light on the "new information" problem. However, that would not answer the last "provided however" clause of the section. That clause forces the decision maker to decide whether the challenge is to the plan or to particular activities. That decision must be made in the first instance by the trial court.

Plaintiffs' Motion

The plaintiffs have asked us to consider the merits of their motion for summary judgment. The district court has not yet had the opportunity to consider the motion,

and we decline to conduct an independent search of documents and reports to rule on a summary judgment motion.

We vacate the temporary injunction that was granted pending appeal, without prejudice to the plaintiffs' effort to obtain site specific injunctive relief from the district court if plaintiffs can establish a likelihood of success on the merits of their challenges of particular sales. We express no opinion upon the ultimate right to injunctive relief.

Cross Appeal

On cross-appeal, NFRC and the Huffman & Wright Group (intervenors) argue that the district court erred in refusing to permit them to intervene as defendants as to the plaintiffs' NEPA claim. The district court found that the intervenors were not entitled to intervention of right on the NEPA claim because they lacked "an interest relating to the property or transaction which is the subject of the action," as required by Fed.R.Civ.P. 24(a)(2). On appeal, the plaintiffs do not challenge the district court's decision to allow intervention as to the other claims.

In our circuit,

> [a]n order granting intervention as of right is appropriate if (1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and (4) the applicant's interest is not adequately represented by the existing parties.

County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir.1986) (quoting U.S. v. Stringfellow, 783 F.2d 821 at 826), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed.2d 791 (1987).

The only remaining question is whether the intervenors have satisfied the second prong of the intervention test, the "interest" requirement, because no one denies that they have an economic interest in ensuring a continued supply of timber from BLM lands.[1]

> We have rejected the notion that Rule 24(a)(2) requires a specific legal or equitable interest. . . . We agree with the D.C. Circuit that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons

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[1] The plaintiffs urge us to find that a party seeking to intervene must have standing, as the D.C. Circuit has held. *See Cook v. Boorstein*, 763 F.2d 1462, 1470-71 (D.C.Cir.1985). However, we in the past have resolved intervention questions without making reference to standing doctrine. *See, e.g., Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-29 (9th Cir.1983). The Supreme Court recently declined to decide "whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68-69 & n. 21, 106 S.Ct. 1697, 1706-1707, n. 21, 90 L.Ed.2d 48 (1986) (observing that "[t]he Courts of Appeals have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing"). Without an en banc review, we must follow the *Sagebrush Rebellion* analysis and decline to incorporate an independent standing inquiry into our circuit's intervention test. However, the standing requirement is at least implicitly addressed by our requirement that the applicant must "assert[] an interest relating to the property or transaction which is the subject of the action." *County of Orange*, 799 F.2d at 537 (quoting *Stringfellow*, 783 F.2d at 826).

> as is compatible with efficiency and due process.' " . . . The "interest test" is basically a threshold one, rather than the determinative criterion for intervention, because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene.

County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir.1980) (citations omitted).

The district court relied upon the analysis of *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir.1982) (per curiam), in holding that the intervenors could not intervene as to the plaintiffs' NEPA claim.

In *Wade*, the Seventh Circuit rejected the attempt of a corporation, four families, and assorted city and county governments to intervene as defendants where the plaintiffs had challenged a proposed bridge and expressway project as violative of several federal statutes, including NEPA. *See id.* at 184-85. The *Wade* court found that the proposed intervenors did not possess the "direct, significant legally protectable interest in the property or transaction" required for intervention under Fed.R.Civ.P. 24(a)(2). *Id.* at 185.

> The only interest involved is of the named defendants, governmental bodies. . . . [T]he only focus that the ongoing litigation . . . can have is whether the governmental bodies charged with compliance, defendants, have satisfied the federal statutory procedural requirements in making the administrative decisions regarding the construction which would directly affect plaintiffs' property. In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. As to the determination involved in

> this suit, all other entities have no right to intervene as defendants.

Id.

The intervenors argue that we should not follow *Wade* because it was based upon an unduly restrictive view of the "interest" test. However, the footnote relied upon by the intervenors suggests that the "interest" test will not be satisfied where a holding "will not affect a statute or regulation governing the applicants' actions, nor will it directly alter contractual or other legally protectable rights of the proposed intervenors." *Id.* at 189 n. 6. This accords with our circuit doctrine that Fed.R.Civ.P. 24(a)(2) requires no "specific legal or equitable interest," *County of Fresno*, 622 F.2d at 438, as modified by the Supreme Court's statement that the rule does require a "significantly protectable interest," *Donaldson v. United States*, 400 U.S. 517, 531, 91 S.Ct. 534, 542, 27 L.Ed.2d 580 (1971).

We reject the intervenors' argument that *Wade* is inconsistent with two of our cases. In *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir.1983), we found that the intervenor environmental groups, which had asserted "environmental, conservation and wildlife interests," had an adequate interest in the litigation to intervene on behalf of the defendant government officials where the plaintiffs had challenged the government's attempt to create a bird preserve. In *County of Fresno*, 622 F.2d at 437-38, we found that an organization of small farmers could intervene as defendants against a challenge to federal reclamation laws because the organization's members were "precisely those Congress intended to protect with the reclamation acts and precisely those who will be injured." The intervenors' claim here, unlike

those made in *Sagebrush Rebellion* and *County of Fresno*, has no relation to the interests intended to be protected by the statute at issue – in this case, NEPA. Hence, *Wade* does not conflict with our circuit's precedents.

The district court correctly followed *Wade* in holding that the intervenors lack an adequate interest relating to the plaintiffs' NEPA claims where NEPA provides no protection for the purely economic interests that they assert. Although the intervenors have a significant economic stake in the outcome of the plaintiffs' case, they have pointed to no "protectable" interest justifying intervention as of right. *Donaldson*, 400 U.S. at 531, 91 S.Ct. at 542. We therefore affirm the district court's denial of the intervenors' motion to intervene as of right on the plaintiffs' NEPA claims. Upon remand, the intervenors are of course free to request the district court's permission to submit amicus briefing on the NEPA claims.

We reverse the judgment dismissing the action and remand for further proceedings. We vacate the stay pending appeal, without prejudice to any appropriate renewed efforts by the plaintiffs to obtain such temporary remedies, if any, as the district court may deem necessary and proper. We affirm the district court's denial of the motion by NFRC and the Huffman & Wright Group to intervene as defendants on the plaintiffs' NEPA claims.

REVERSED IN PART, AFFIRMED IN PART, and REMANDED.

NO PARTY TO RECOVER COSTS.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUDUBON SOCIETY, CENTRAL OREGON AUDUBON SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs,

v.

DONALD HODEL, in his official capacity as Secretary, United States Department of Interior,

Defendant.

and

NORTHWEST FOREST RESOURCE COUNCIL,

Defendant-Intervenor.

Civil No. 87-1160-JU

OPINION

(Filed February 1, 1988)

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FRYE, Judge:

In the matter before the court, applicants for intervention, Huffman & Wright Logging Co., Freres Lumber Co., Inc., Lone Rock Timber Co., Inc., Scott Timber Co., Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., and Cornett Lumber Company, Inc., move the court for reconsideration of the order entered by the Honorable George E. Juba, United States Magistrate, on January 6, 1988 denying their motion to intervene.

BACKGROUND

This action arises out of an administrative proceeding pending before the Interior Board of Land Appeals. Plaintiffs are various environmental groups who assert that the Bureau of Land Management's (BLM's) management of forest resources destroys the habitat for the northern spotted owl. Huffman & Wright, et al. are timber producers and timber product companies which allegedly submitted the high bids on one or more of the timber sales that plaintiffs seek to enjoin in protection of the northern spotted owl. Judge Juba, in his order of January 6, 1988, examined the claims of the proposed intervenors and concluded that intervention was not appropriate in that the interests of the proposed intervenors are adequately represented by the Northwest Forest Resource Council (NFRC), which was allowed to intervene in an order dated December 14, 1987.

ANALYSIS

Since the case has been assigned to this court for all further proceedings, the motion will be determined *de novo*.

Intervention may be allowed as of right or by permission. In deciding whether Huffman & Wright, et al. have a right to intervene, the court must address these issues:

1) Was Huffman & Wright, et al.'s motion to intervene timely filed?

2) Have Huffman & Wright, et al. asserted interests relating to the property or transaction which is the subject of this case?

3) Are Huffman & Wright, et al. so situated that without intervention the disposition of this case may, as a practical matter, impair or impede their ability to protect those interests?

4) Are Huffman & Wright, et al. not adequately represented by the existing parties?

County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S. Ct. 1605 (1987).

As to the first three issues, the answers are "yes." As to the fourth issue, the position of Huffman & Wright, et al. is that a company which is the high bidder on a timber sale has the absolute right to intervene in an action which seeks to prevent the company from realizing its legal right to receive the award of the sale.

A leading case on this issue is *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10, 92 S. Ct. 630, 636 n. 10, 30 L. Ed. 2d 686 (1972). The Court there stated that "[t]he

requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal."

Id.; accord, Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 528 (9th Cir. 1983).

7C C. Wright & A. Miller, Federal Practice & Procedure, § 1909, at 319 (1986), states as follows on this issue:

> [I]f [an applicant's] interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, but he ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation for the absentee.

In this case, there is the possibility that the interests of Huffman & Wright, et al. will diverge somewhat from the interests of NFRC, or that NFRC will want to emphasize certain facts or law in the case while Huffman & Wright, et al. will want to emphasize other facts or law in the case. The NFRC, with a regional perspective, may be unwilling to expend its resources to advocate the specialized cases of Huffman & Wright, et al., the individual high bidders.

While the court declines to say that as a matter of right Huffman & Wright, et al. can intervene, the court will allow Huffman & Wright, et al. to intervene under Fed. R. Civ. P. 24(b) with respect to those issues involving the BLM's Forest Resources Policy Statement and denied as to plaintiff's claims based on the BLM's failure to prepare a supplemental Environmental Impact Statement.

DATED this 1 day of February, 1988.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUDUBON SOCIETY, CENTRAL OREGON AUDUBON SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL,

Plaintiffs,

v.

DONALD HODEL, in his official capacity as Secretary, United States Department of Interior,

Defendant.

and

NORTHWEST FOREST RESOURCE COUNCIL,

Defendant-Intervenor.

Civil No. 87-1160-JU

OPINION

(Filed January 29, 1988)

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FRYE, Judge:

In the matter before the court, the defendant-intervenor, Northwest Forest Resource Council (NFRC), requests reconsideration by this court, pursuant to 28 U.S.C. § 636(b)(1)(A), of certain portions of an order of

the Honorable George E. Juba, United States Magistrate, dated December 14, 1987. The order sets out the background of the action as follows:

> This action arises out of an administrative proceeding pending before the Interior Board of Land Appeals. In that proceeding the plaintiffs, who are various environmental groups, are appealing a decision of the Oregon State Director of the Bureau of Land Management (BLM) not to prepare a supplemental environmental impact statement (EIS). Between 1979 and 1983 the BLM prepared an EIS for each of the seven timber management plans currently in effect for the BLM lands in Oregon. The plaintiffs contend that the BLM is required to prepare a supplemental EIS because new information has been developed since the original EISs were prepared.
>
> The plaintiffs also challenge the BLM's 1983 Forest Resources Police Statement (FRPS). This statement, according to plaintiffs, establishes the BLM's policy for managing forest resources on BLM's lands. Plaintiffs contend that this policy violates the Oregon and California Lands Act, 43 U.S.C. §§ 1181a et seq. Finally, plaintiffs contend that the BLM's management of the forest resources in such a method that destroys habitat for the northern spotted owl violates the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq.
>
> The proposed intervenor, the Northwest Forest Resource Council (NFRC) is a coalition of ten timber industry groups. Members of those groups bid on and purchase timber from lands managed by the BLM. The NFRC seeks to intervene because the outcome of this lawsuit may affect the availability of federal timber for sale to members of the NFRC. The NFRC seeks to intervene as a matter of right, or, in the alternative, for permission to intervene.

In that order, Judge Juba allowed NFRC to intervene as a matter of right or permissively as to all claims except

for Count 1 of the complaint which asserts that the defendant has violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, by failing to prepare a supplemental environmental impact statement for its timber plans to reflect alleged significant new information regarding the northern spotted owl. Judge Juba concluded that Count 1 is the type of claim in which the government is the only proper defendant and intervention was not appropriate.

NFRC asserts that it should be allowed to intervene as to Count 1 because plaintiffs effectively seek to shut down the entire timber sale program of the BLM, to the enormous and unquestionable detriment of the companies which belong to NFRC, for as long as it may take the BLM to prepare new impact statements.

Plaintiffs assert that Judge Juba correctly concluded that the provisions of the acts alleged in Count 1 seek to enforce obligations imposed upon federal agencies only and do not apply in any way to private citizens.

In addition, NFRC and the federal defendant object to the restrictions imposed by Judge Juba upon the participation by NFRC as follows:

> 3. Requests for delays or extensive discovery by the NFRC will not be looked upon favorably; and
>
> 4. The NFRC and the BLM are required to coordinate their briefing and other submissions of materials. Separate papers should be submitted only when the NFRC's position demonstrably and necessarily differs from that of the defendants.

(Order dated December 14, 1987, p. 11).

NFRC argues that these restrictions on its participation in this lawsuit are improper and unworkable, and that Judge Juba has recognized that NFRC has a right to intervene in this action as a party, and therefore there is no basis for denying NFRC the same rights under the Federal Rules of Civil Procedure which any party to a lawsuit enjoys. To the extent that Judge Juba's restrictions act as restrictions upon the federal defendant, it too objects to them.

ANALYSIS AND CONCLUSION

This court reviews Judge Juba's order under 28 U.S.C. § 636(b)(1)(A) to determine whether it has been shown that the order is clearly erroneous or contrary to law.

As to the denial of NFRC's motion to intervene on Count 1, the court finds that Judge Juba's order is not clearly erroneous or contrary to law. While NFRC points out that a decision against the defendant may have a negative impact upon the business of its members, intervention as a matter of right requires that the proposed intervenor's interest relate to the property or the transaction which is the subject of the action. Fed. R. Civ. P. 24(a)(2). Judge Juba was not clearly erroneous in relying upon the reasoning in *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982). As *Wade* points out, when the focus of a proceeding is whether governmental bodies charged with compliance with a statute have satisfied the federal statutory procedural requirements in making administrative decisions, the governmental bodies charged with compliance can be the only defendants. *Id.* at 185.

However, the court concludes that Judge Juba's restrictions upon NFRC's intervention in this case are premature. A party entitled to intervene is entitled to the benefit of its own advocacy absent a specific reason to limit its participation.

The court denies the motion of the defendant-intervenor, NFRC, to reconsider Judge Juba's order of December 14, 1987, with the exception of Nos. 3 and 4 of the conclusion. As to Nos. 3 and 4 of the conclusion, they are heretofore deemed vacated.

DATED this 29 day of January, 1988.

/s/ Helen J. Frye
Helen J. Frye
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, et al., Plaintiffs,	Civil No. 87-1160-JU
v.	ORDER
DONALD HODEL, in his official capacity as Secretary, United States Department of Interior, Defendant.	(Filed January 6, 1988)

JUBA, Magistrate:

I. *INTRODUCTION*

This action arises out of an administrative proceeding pending before the Interior Board of Land Appeals. In that proceeding the plaintiffs, who are various environmental groups, are appealing a decision of the Oregon State Director of the Bureau of Land Management (BLM) not to prepare a supplemental environmental impact statement (EIS). Between 1979 and 1983 the BLM prepared an EIS for each of the seven timber management plans currently in effect for the BLM lands in Oregon. The plaintiffs contend that the BLM is required to prepare a supplemental EIS because new information has been developed since the original EISs were prepared.

The plaintiffs also challenge the BLM's 1983 Forest Resources Policy statement (FRPS). This statement, according to plaintiffs, establishes the BLM's policy for managing forest resources on BLM's lands. Plaintiffs contend that this policy violates the Oregon and California Lands Act, 43 U.S.C. §§ 1181a et seq. Finally, plaintiffs

contend that the BLM's management of the forest resources in such a method that destroys habitat for the northern spotted owl violates the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq.

The proposed intervenors are timber producers and timber product companies which allegedly submitted the high bids on one or more of the timber sales that plaintiffs seek to enjoin. The applicants seek to intervene because the BLM has postponed the award of those timber sales pending resolution of this action. The applicants seek to intervene as a matter of right, or, in the alternative, for permission to intervene.

II. *DISCUSSION*

A. *Intervention as of Right*

The Ninth Circuit has developed a four-part test for determining whether an application for intervention as a matter of right should be granted pursuant to Fed. R. Civ. P. 24(a)(2). For the application to be granted:

> (1) The applicant's motion must be timely;
>
> (2) The applicant must assert an interest relating to the property or transaction which is the subject of the action;
>
> (3) The applicant must be so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and
>
> (4) The applicant's interest must not be adequately represented by the existing parties.

County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986) *cert. denied* ___ U.S. ___, 107 S. Ct. 1605 (1987).

Because I have set forth the details of the standards for intervention in my earlier order allowing the Northwest Forest Resource Council (NFRC) to intervene, I do not repeat those matters here except where necessary to decide the instant application.

1. *Timeliness*

The applicants contend that their application is timely. There has been no opposition on timeliness grounds. The application is timely.

2. *Intervenor's Interest*

The applicants contend that they have a cognizable interest in this litigation because they have successfully bid on certain timber sales made by the BLM. If plaintiffs are successful, the validity of these sales may be in doubt, thus adversely affecting the applicants. The applicants also contend that they are the direct and intended beneficiaries of the federal statutes that guide the BLM's management of the lands at issue.

Plaintiffs argue that the applicants do not have any legally cognizable interest in the outcome of this litigation. They argue that the provisions of the federal statutes that they seek to enforce impose obligations on federal agencies only, and do not mention or apply to private citizens in any way. Since enforcement of the federal statutes would not impose any obligations on the applicants, plaintiffs argue that they have no legally cognizable interest.

In my order regarding the application of the NFRC to intervene, I concluded that the federal government was the only proper defendant as to the plaintiffs' claim that the BLM violated the National Environmental Policy Act by failing to prepare a supplemental EIS. The same result follows here. *See Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982). The requirement of preparing an adequate EIS applies only to the federal government, and the mere fact that a lawsuit to compel preparation of an EIS may adversely affect the economic interests of some entity is insufficient to create the necessary interest to intervene. *Id.*

In their reply brief, applicants argue that they must be allowed to intervene because they are indispensable parties under Fed. R. Civ. P. 19. Assuming, *arguendo*, that applicant's contention is correct, this does not indicate that the motion to intervene must be granted. As the cases cited by applicants indicate, the issue of whether third parties are indispensable arises upon a motion to dismiss or stay filed by the existing defendant. The government has not filed such a motion in this case. Accordingly, the issue of whether or not applicants are indispensable parties is not properly before the court.

As to plaintiffs' challenge to the FRPS, I held that the NFRC and its members did have cognizable interest. I allowed the NFRC to intervene on the issue of whether the FRPS is valid, since a finding that the FRPS is invalid might severely limit the availability of federal timber to the NFRC and its members. I noted the distinction drawn by the *Wade* court between procedural statutes, such as the National Environmental Policy Act, and substantive regulations directly governing contractual or other legal

rights of an applicant for intervention. *See id.* at 186, n.6. I concluded that under this distinction, the NFRC had a sufficient interest to intervene on the issue of the validity of the FRPS.[1] The applicant's interest here is similar. Accordingly, I conclude that they have a sufficient interest to intervene on the issue of the validity of the FRPS.

3. *Impairment of Ability to Protect Interest*

In deciding the application of the NFRC to intervene, I noted that resolution of the plaintiffs' claims would provide judicial precedent for any subsequent litigation involving the validity of the FRPS. I also noted that the NFRC and its members would be affected by any remedy imposed by the court. I concluded that the NFRC had satisfied the third element of the test for intervention. For these same reasons, I find that these applicants have also satisfied this element.[2]

4. *Adequacy of Representation*

The final element for intervention as of right is that the intervenor's interests must not be adequately protected by the existing parties. I earlier noted that the government defendant could not adequately represent

---

[1] Contrary to the NFRC's assertion, it is not inconsistent to allow the NFRC to intervene on one issue and not on another even though the ultimate remedy sought may be the same.

[2] Again, the fact that the remedy may affect an applicant does not necessarily entitle it to intervene on all issues. *See* footnote 1, *supra*.

the interests of the NFRC.[3] In this matter, the plaintiffs argue that the NFRC can adequately represent the interests of the applicants. Plaintiffs argue that the applicants are, in all likelihood, members of the NFRC. Plaintiffs also point out that the NFRC and the applicants are represented by the same law firm.

The factors to consider in determining whether existing parties will adequately represent the interests of the proposed intervenors are: whether the present parties will undoubtedly make all of the intervenor's arguments; whether the present parties are capable and willing to make those arguments; and whether the intervenors would offer any necessary elements to the proceedings that other parties would neglect. *People of the State of California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986).

In this case, the applicants contend that although they agree with the interests and position of the NFRC, the NFRC "cannot represent the specific interests of any individual company" and the NFRC "is not authorized to act on behalf of any individual company." This, however, is not the appropriate test. If the NFRC were correct in this contention, then there would rarely be a situation where adequate representation exists. The NFRC cites no authority in support of this proposition, and whether a

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[3] The fact that I have concluded that the government cannot adequately represent the NFRC does not, contrary to the NFRC's claim, also mean that the government and the NFRC cannot be required to coordinate their briefing and submission of other materials as required as a condition of the intervention.

party is "authorized" to act on behalf of an applicant is not one of the factors listed by the court in *Tahoe Regional Planning Agency*.

I find that the interests of the NFRC are sufficiently similar to those asserted by the applicants that the NFRC will adequately represent the applicant's interests in this litigation. The NFRC has already shown that it will aggressively pursue this litigation and advance the interests of timber groups and companies. There is noting to indicate that the NFRC, which is represented by the same law firm as are the applicants, is unwilling or unable to advance the arguments and interests of the applicants as well as those of the NFRC.[4] The applicants also argue that each possesses special knowledge with respect to each timber sale with which it was involved. While I do not find this argument particularly persuasive, there is nothing to prevent the applicants from sharing their knowledge with the NFRC, if they have not already done so. Accordingly, although the burden for adequate representation is low, I find that the existing parties will adequately represent the applicants in this case.

In summary, the applicants have met the first three parts of the test for intervention as of right, at least on the issue of the validity of the FRPS. However, because their interests are adequately represented by the existing parties, their motion to intervene as of right is denied.

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[4] It would, in fact, be quite unusual if the NFRC did not attempt to advance the interests of its constituent members.

B. *Permissive Intervention*

The applicants also seek permission to intervene under Fed. R. Civ. P. 24(b). Under that rule, the court may grant permission to intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." In this case, my conclusion that the applicants' interests are adequately represented by existing parties leads me to conclude that allowing the applicants to intervene would be redundant and impair the efficiency of this litigation. Consequently, I decline to grant the applicants permission to intervene. *See Tahoe Regional Planning Agency*, 792 F.2d at 779 (District court did not abuse its discretion in denying permission to intervene when applicant's interests were adequately protected by existing parties).

III. *CONCLUSION*

For the reasons set forth above, applicants' motion to intervene (#20) is denied.

Dated this 6 day of January, 1988.

/s/ George E. Juba
United States Magistrate

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND AUDUBON SOCIETY, HEADWATERS, LANE COUNTY AUDUBON SOCIETY, OREGON NATURAL RESOURCES COUNCIL, THE WILDERNESS SOCIETY, SIERRA CLUB, INC., SISKIYOU AUDUBON SOCIETY, CENTRAL OREGON AUDUBON SOCIETY, KALMIOPSIS AUDUBON SOCIETY, UMPQUA VALLEY AUDUBON SOCIETY, NATURAL RESOURCES DEFENSE COUNCIL,	Civil No. 87-1160-JU
Plaintiffs,	ORDER
v.	(Filed December 14, 1987)
DONALD HODEL, in his official capacity as Secretary, United States Department of Interior,	
Defendant.	

JUBA, Magistrate:

I. *INTRODUCTION*

This action arises out of an administrative proceeding pending before the Interior Board of Land Appeals. In that proceeding the plaintiffs, who are various environmental groups, are appealing a decision of the Oregon State Director of the Bureau of Land Management (BLM) not to prepare a supplemental environmental impact statement (EIS). Between 1979 and 1983 the BLM prepared an EIS for each of the seven timber management plans currently in effect for the BLM lands in Oregon.

The plaintiffs contend that the BLM is required to prepare a supplemental EIS because new information has been developed since the original EISs were prepared.

The plaintiffs also challenge the BLM's 1983 Forest Resources Policy Statement (FRPS). This statement, according to plaintiffs, establishes the BLM's policy for managing forest resources on BLM's lands. Plaintiffs contend that this policy violates the Oregon and California Lands Act, 43 U.S.C. §§ 1181a et seq. Finally, plaintiffs contend that the BLM's management of the forest resources in such a method that destroys habitat for the northern spotted owl violates the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 et seq.

The proposed intervenor, the Northwest Forest Resource Council (NFRC) is a coalition of ten timber industry groups. Members of those groups bid on and purchase timber from lands managed by the BLM. The NFRC seeks to intervene because the outcome of this lawsuit may affect the availability of federal timber for sale to members of the NFRC. The NFRC seeks to intervene as a matter of right, or, in the alternative, for permission to intervene.

II. *DISCUSSION*

A. *Intervention as of Right*

The Ninth Circuit has developed a four-part test for determining whether an application for intervention as a matter of right should be granted pursuant to Fed. R. Civ. P. 24(a)(2). For the application to be granted:

> (1) The applicant's motion must be timely;
>
> (2) The applicant must assert an interest relating to the property or transaction which is the subject of the action;
>
> (3) The applicant must be so situated that without intervention the disposition may, as a practical matter, impair or impede its ability to protect that interest; and
>
> (4) The applicant's interest must not be adequately represented by the existing parties.

County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986) *cert. denied* ___ U.S. ___, 107 S. Ct. 1605 (1987).

1. *Timeliness*

In determining timeliness, three factors are considered: the stage of the proceeding at which the applicant seeks to intervene; the prejudice to other parties; and the reason for and length of the delay. *Id.* In this case, there has been no opposition on timeliness grounds. As this action was only filed on October 19, 1987, any such opposition would be groundless.

2. *Intervenor's Interest*

The primary opposition to the NFRC's motion to intervene is that the NFRC does not, according to plaintiffs, have a legally cognizable interest in the outcome of this litigation. Plaintiffs argue that the provisions of the federal statutes that they seek to enforce impose obligations on federal agencies only, and do not mention or apply to private citizens in any way. Since enforcement of the federal statutes would not impose any obligations on

the NFRC or its members, plaintiffs argue that they have no legally cognizable interest.

The NFRC counters by arguing that it and its members may be adversely affected by the outcome of plaintiff's lawsuit. They point out that members of the NFRC depend heavily on timber from the BLM lands for operation of their businesses. If the plaintiffs' suit has the effect of eliminating or limiting the supply of BLM timber, NFRC and its members may suffer economic hardship. The NFRC also argues that it and its members are the direct and intended beneficiaries of the federal statutes that guide the BLM's managment of the lands at issue.

Neither party has cited any applicable Ninth Circuit authority on this issue[1] and my own research has revealed none. However, other courts have addressed similar cases. In *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 578 F.2d 1341 (10th Cir. 1978), the plaintiffs sought declaratory and injunctive relief prohibiting certain government agencies from issuing licenses for the operation of uranium mills in New Mexico without first preparing an EIS. The American Mining Congress and Kerr-McGee Corporation sought to intervene as a matter of right. Kerr-McGee was a potential recipient of the licenses.

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[1] NFRC's citation to *Southeast Alaska Conservation Council, Inc. v. Watson*, 35 Fed. R. Serv. 2d 1255 (9th Cir. 1983) is inappropriate. As is clearly indicated in the reporter, that case was a "memorandum" opinion, and not to be considered or cited as precedent under Ninth Circuit Rule 21. It is thus improper for NFRC to cite this case, and I do not consider it.

The plaintiffs opposed the intervention of the basis that Kerr-McGee did not have the requisite interest. They argued, as do plaintiffs here, that Kerr-McGee was not directly involved in the controversy, defined as the plaintiffs' efforts to prevent the issuance of licenses prior to the preparation of an EIS. The court rejected the argument, and concluded that Kerr-McGee did have a requisite interest. *Id.* at 1344. The court first noted that the consequences of the litigation could be that no uranium licenses would be granted before an EIS was prepared. *Id.* Because Kerr-McGee operated a mill pursuant to a license (and an application for renewal of the license was pending) and also owned uranium properties in New Mexico, the litigation might have had a significant impact of Kerr-McGee: "[a] decision in favor of the plaintiffs, which is not unlikely, could have a profound effect upon Kerr-McGee. Hence, it does have an interest within the meaning of Rule 24(a)(2)." *Id.*

In *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982), the plaintiffs challenged the Department of Transportation's approval of a proposed expressway and bridge. The plaintiffs alleged violations of several federal statutes, including an allegation that a proper EIS was not prepared. The proposed intervenors were various individuals and organizations who would benefit economically from construction of the expressway and bridge. The court held that the applicants had no right to intervene:

> [t]he only interest involved is of the named defendants, governmental bodies. As we emphasized in Part II [of this opinion] the only focus that the ongoing litigation in the district court can have is whether the governmental bodies charged with compliance,

> defendants, have satisfied the federal statutory procedural requirements in making the administrative decisions regarding the construction which would directly affect plaintiffs' property. In a suit such as this, brought to require compliance with federal statutes regulating governmental projects, the governmental bodies charged with compliance can be the only defendants. As to the determination involved in this suit, all other entities have no right to intervene as defendants. Thus we hold that the proposed intervenors' interests do not relate "to the property or transaction which is the subject of the action" and they have therefore failed to assert an interest in the lawsuit sufficient to warrant intervention as of right.

Id. at 185 (footnote omitted).

As to plaintiffs' claim that the BLM should have prepared a supplemental EIS, I find *Wade* persuasive. The issue on that claim is whether or not the BLM violated the National Environmental Policy Act by failing to prepare a supplemental EIS. This is a claim based on procedure that also may have substantive effects on various individuals. I agree with the *Wade* court that this is the type of claim in which the government is the only proper defendant.

However, as to plaintiffs' claim that the BLM's FRPS violates federal statutes, the result is otherwise. In *Wade*, the court noted that the case was not one where the lawsuit might invalidate a regulation directly governing the proposed intervenors or otherwise alter contractual or other legally protectable rights. *Id.* at 186, n.6. Here, plaintiffs claim that the BLM's FRPS, pursuant to which of the BLM manages the lands in such a way that benefits the NFRC and its members, violates various federal statutes. If the plaintiffs prevail on this claim, it is likely that

the supply of federal timber available to NFRC and its members will be significantly affected. While the NFRC and its members may not have a legally protected interest in continuing to receive federal timber, I find that they do have an interest significant enough to intervene on plaintiffs' claims regarding the FRPS. Invalidation of the FRPS would have a much more direct effect on the intervenors than would a determination that the BLM must prepare a supplemental EIS.

In short, the NFRC may intervene as of right only with respect to those claims premised on the invalidity of the FRPS. For the reasons expressed in *Wade*, NFRC is not entitled to intervene on the issue of whether or not the BLM must prepare a supplemental EIS. *See* Fed. R. Civ. P. 24, advisory committee note ("An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirments of efficient conduct of the proceedings.")

3. *Impairment of Ability to Protect Interest*

The NFRC contends that unless it is allowed to intervene, the interests of its members will be impaired. The NFRC argues that should plaintiffs prevail, the supply of federal timber will be interrupted, thus causing harm to the members' economic interests. The NFRC also argues that the *stare decisis* effect of any decision in this case is sufficient to constitute impairment of the interests of the NFRC and its members.

In *United States v. Stringfellow*, 783 F.2d 821, 826-27 (9th Cir. 1986) *vacated* ___ U.S. ___, 107 S. Ct. 1177 (1987),

the court noted that under certain circumstances the prospect of *stare decisis* may supply the requisite practical impairment warranting intervention as of right. This would be particularly true where the issues of fact and law were common to the claims of the original parties and the intervenors, and where disposition of the litigation would establish the applicable remedial scheme. *Id.* at 827.

In this case, resolution of the plaintiffs' claims would provide judicial precedent for any subsequent litigation involving the validity of the FRPS. As a practical matter, therefore, the intervenors may only have this one opportunity to present their their case. Moreover, should plaintiffs prevail the NFRC and its members will certainly be affected by the remedy imposed by the court. I find that the third element for intervention as of right has been satisfied.

4. *Adequacy of Representation*

The final element for intervention as of right is that the intervenor's interests must not be adequately protected by the existing parties. In this case, the NFRC argues that this element is met because the BLM's interests are much broader than the interests of the NFRC and its members. The NFRC argues that it is only interested in maintaining an adequate supply of federal timber for its members, while the BLM is interested in sustaining its general policies and procedures relating to environmental impact statements and land management generally.

The factors to consider in determining whether the existing parties will adequately represent the interests of

the proposed intervenors are: whether the present parties will undoubtedly make all of the intervenor's arguments; whether the present parties are capable and willing to make those arguments; and whether the intervenor would offer any necessary elements to the proceedings tht other parties would neglect. *People of the State of California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). The applicant for intervention need only make a minimal showing that representation of its interests may be inadequate. *Id.* Inadequate representation has been found when the interests of the intervenors conflict with those of several existing parties, *Stringfellow*, 783 F.2d at 828, where a party may be involved on both sides of a lawsuit, *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983), and when the intervenors had to prod the existing parties into litigation. *County of Fresno v. Andrus*, 622 F.2d 436, 439 (9th Cir. 1980).

In this case, the BLM can be expected to defend its FRPS, which is to the advantage of the NFRC and its members. However, it is not clear that the BLM will undoubtedly make all of the NFRC's arguments. Given the minimal showing required for inadequate representation, I find the fourth element is satisfied as well.

In summary, I find that the NFRC has met all four of the elements required for intervention as of right. However, their intervention shall be limited to issues involving the BLM's FRPS; NFRC should not be allowed to participate in plaintiffs' claims based on the BLM's failure to prepare a supplemental EIS.

B. *Permissive Intervention*

Because I have concluded that the NFRC can intervene as to certain issues as a matter of right, I only briefly discuss their contention that they should be allowed to intervene with the court's permission. The court may grant permission to intervene "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b).

As demonstrated in section II A, there are common questions of law or fact as to the claims involving the FRPS. Accordingly, I would also grant the NFRC permission to intervene under Fed. R. Civ. P. 24(b) as to claims involving the FRPS. However, I would not grant the NFRC permission to intervene on other issues.

III. *CONCLUSION*

For the reasons set forth above, the NFRC's motion to intervene as defendants (#5) is granted in accordance with the following conditions:

1. The NFRC shall only be allowed to participate with respect to those issues involving the BLM's FRPS;

2. The NFRC's participation shall not interfere with the expeditious prosecution of this action;

3. Requests for delays or extensive discovery by the NFRC will not be looked upon favorably; and

4. The NFRC and the BLM are required to coordinate their briefing and other submissions of materials. Separate papers should be submitted only when the

NFRC's position demonstrably and necessarily differs from that of the defendants.

Dated this 14 day of December, 1987.

/s/ George E. Juba
United States Magistrate

APPENDIX F

NATIONAL ENVIRONMENTAL POLICY

Title 42 U.S.C.

§ 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

Pub.L. 91-190, § 2, Jan. 1, 1970, 83 Stat. 852.

SUBCHAPTER I – POLICIES AND GOALS

§ 4331. Congressional declaration of national environmental policy

Creation and maintenance of conditions under which man and nature can exist in productive harmony

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and develpment of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the

general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of *national policy*, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may–

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Responsibility of each person to contribute to preservation and enhancement of environment

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall–

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on–

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Supreme Court, U.S.
FILED
JUN 6 1989
JOSEPH E. SPANIOL, JR.
CLERK

No. 88-1751

In The

Supreme Court of the United States

October Term, 1988

NORTHWEST FOREST RESOURCE COUNCIL, et al.,

Petitioners,

v.

PORTLAND AUDUBON SOCIETY, et al.,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

In this action, respondents Portland Audubon Society et al. (collectively, "PAS") challenge a 1987 decision by the federal Bureau of Land Management ("BLM") not to prepare a supplemental Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA").[1] PAS alleges that BLM's failure to address significant new information concerning the potential extinction of the northern spotted owl (a species found in – and dependent on – old-growth forests in the Pacific Northwest) violates NEPA. PAS seeks to have the BLM address in an EIS new information concerning the threat to the owl posed by the cumulative impacts of habitat fragmentation resulting from clearcut logging on BLM-administered lands in Oregon.[2]

NEPA imposes obligations only on the federal government, and PAS named only the Secretary of Interior as a defendant in the action. PAS seeks declaratory and

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[1] PAS' complaint also alleges violations of the Migratory Bird Treaty Act, 16 U.S.C. § 703 et seq., the Oregon and California Lands Act, 43 U.S.C. § 1181, and the Federal Land Policy Act, 43 U.S.C. § 1701 et seq. Because Petitioners were granted intervention as to these non-NEPA claims, they play no role in the instant petition.

[2] As a result of a federal district court ruling in November 1988, *Northern Spotted Owl v. Hodel*, No. C88-573Z (W.D. Wa. Nov. 18, 1988) (Order of Remand), and in light of much of the same information that underlay PAS' claim in this case, the U.S. Fish & Wildlife Service has recently recommended adding the northern spotted owl to the list of threatened and endangered species under the Endangered Species Act, 16 U.S.C. § 1531 et seq. *See* Revised Finding and Supplemental Status Review, filed by federal defendants in *id.* (Apr. 25, 1989).

injunctive relief requiring BLM to prepare a supplemental EIS, and preventing BLM from offering or awarding future timber sales containing stands of trees older than 200 years within 2.1 miles of known spotted owl sites previously identified by the BLM, pending compliance with NEPA. PAS neither complains of nor seeks relief as to any other timber sales on BLM lands.

Petitioner Northwest Forest Resource Council (the "Council") and a group of bidders on BLM timber sales (the "H&W Group") (collectively, "NFRC") moved to intervene in this action. The sole interest asserted by these parties was economic. The Council is a coalition of ten timber industry groups, which alleged its members bid on and purchase timber from lands managed by the BLM. The H&W Group, in turn, includes timber producers and timber product companies which allegedly "submitted the high bid" on various timber sales from BLM lands. The Council and the H&W Group argued that these purely economic interests, standing alone, entitled them to intervene as of right in PAS' NEPA action pursuant to Federal Rule of Civil Procedure 24(a)(2).

Although the district court granted NFRC intervention as to PAS' other causes of action, it denied intervention on the NEPA claim. Petitioners' Appendix [Pets' App.] B at A-23; C at A-29-30. Having granted intervention on other claims, however, the district court specifically refused to place any restrictions on NFRC's participation in the case.

The district court granted BLM's motion to dismiss, and PAS appealed to the Court of Appeals for the Ninth Circuit. NFRC cross-appealed on the intervention issue.

The Ninth Circuit reversed the district court on PAS' appeal, remanding for further proceedings, but affirmed on NFRC's cross-appeal. *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989).[3]

SUMMARY OF ARGUMENT

This is not an appropriate case for resolving the relationship between Rule 24(a)(2) and Article III standing requirements. The Ninth Circuit neither reached the issue nor relied on an independent standing requirement to deny intervention under Rule 24.

Moreover, there is no dispute between the Circuit Courts of Appeals for this Court to resolve. NFRC's purported "conflict" between the Ninth Circuit's holding in this case and the Tenth Circuit's ruling in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341 (10th Cir. 1978) concerning the adequacy of a purely economic interest of an applicant for intervention in litigation involving the federal government simply does not exist. Indeed, the Tenth

[3] On remand, the district court recently held that BLM had acted arbitrarily and capriciously in failing to address new, significant and probably accurate information concerning the risk of extinction to the owl. *Portland Audubon Society v. Lujan*, No. 87-1160-FR (D.Ore. May 18, 1989) (Opinion re: Order Granting Summary Judgment). However, the court also held that its jurisdiction to review the case had been removed by Section 314 of the 1988 Budget Act, and therefore granted summary judgment to the BLM. The matter is currently once again on appeal to the Ninth Circuit. *Portland Audubon Society v. Lujan*, 9th Cir. No. 89-35337.

Circuit itself in *Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849 (10th Cir. 1981) (per curiam) specifically rejected NFRC's thesis as "absurd." Such a rule also would be inconsistent with this Court's requirement that applicants for intervention demonstrate a "significantly protectable interest." Finally, the federal courts have uniformly rejected NFRC's contention that NEPA provides protection for purely economic interests.

In short, NFRC has failed to demonstrate grounds for granting the petition for writ of certiorari.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. THIS IS NOT AN APPROPRIATE CASE FOR THE COURT TO RESOLVE THE RELATIONSHIP BETWEEN RULE 24 AND ARTICLE III STANDING, SINCE THE NINTH CIRCUIT RESOLVED THE CASE WITHOUT REACHING THE ISSUE

NFRC urges the Court to use this case to resolve whether a party seeking to intervene pursuant to Rule 24(a)(2) must also possess standing under Article III, an issue on which, as this Court has previously noted, the Courts of Appeals "have reached varying conclusions . . . ." *Diamond v. Charles*, 476 U.S. 54, 68-69 & n. 21 (1986). But the Ninth Circuit specifically declined to address the relationship between Article III and Rule 24 in this case, explicitly referring to the dispute noted in *Diamond*, and instead resolved NFRC's intervention without reference to any independent standing requirement. Pets' App. A-15 n.1:

> [W]e in the past have resolved intervention questions without making reference to standing doctrine. *See, e.g., Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-29 (9th Cir. 1983). The Supreme Court recently declined to decide "whether a party seeking to intervene before a district court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68-69 & n.21, 106 S.Ct. 1697, 1706-07, n.21, 90 L.Ed.2d 48 (1986) . . . . Without an en banc review, we must follow the *Sagebrush Rebellion* analysis and decline to incorporate an independent standing inquiry into our circuit's intervention test.

Id.

Had the Ninth Circuit decided to adopt an independent standing requirement for intervention, and had the Court of Appeals relied on that standing limitation to deny NFRC intervention under Rule 24, this case might appropriately present the issue NFRC wants resolved. But NFRC asks the Court to ignore both the reasoning of the Ninth Circuit and its application of Rule 24(a)(2) to this case in order to resolve an issue not presented by the Court of Appeals' decision.

For this reason alone, the Court should deny the petition for certiorari.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER A PURELY ECONOMIC INTEREST REQUIRES INTERVENTION UNDER RULE 24(a)(2)

In resolving NFRC's application for intervention, the Ninth Circuit held that

> Although the intervenors have a significant economic stake in the outcome of plaintiffs' case, they have pointed to no 'protectable' interest justifying intervention as of right. *Donaldson [v. United States]*, 400 U.S. [517] at 531, 91 S.Ct. at 542 [(1971)].

NFRC argues that this holding conflicts with the Tenth Circuit's decision in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341 (10th Cir. 1978) ("*NRDC*"). According to NFRC, *NRDC* stands for the proposition that Rule 24(a)(2) is "satisfied" wherever "a decision in favor of plaintiffs could have a substantial [economic] effect on the applicants. . . ." Petition at 7.

NFRC, however, seriously misstates the Tenth Circuit's position on this issue. Neither *NRDC* – nor any other case in the federal courts – holds that an applicant for intervention who might suffer an economic impact from the outcome of litigation involving the government necessarily possesses the "interest" needed to satisfy Rule 24(a)(2)'s threshold requirement for intervention, regardless of the statutory policies at issue in the case.

Indeed, the Tenth Circuit has, since *NRDC*, explicitly *rejected* NFRC's thesis that the mere presence of an economic interest in litigation involving the government's discretionary duties satisfies the interest requirement so as to support intervention as of right, calling any such rule "absurd." *See Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849, 851 n.4 (10th Cir. 1981) (per curiam). In *Rosebud*, the court denied intervention to a non-federal coal lessor (RME) in an action between a coal lessee (Rosebud) and the Department of Interior concerning the government's statutory, discretionary right to adjust royalty rates in

federal coal leases. RME's contract with Rosebud tied RME's royalties to those paid by Rosebud to the federal government. In other words, RME, like NFRC in this case, claimed a direct pecuniary interest in the outcome of the underlying litigation. Moreover, like NFRC here, RME's "only claim of interest is in support of the [government's] claim." *Id.*

The Tenth Circuit denied intervention. While the court acknowledged RME's direct economic interest in the outcome of the litigation, the court held that such a "tenuous" or "universal" interest was insufficient to justify intervention. *Id.* The court refused to allow a private party to "bootstrap" such an interest "into unwelcome partnership with the government every time it litigates over one of its discretionary . . . activities." *Id.*[4]

Exactly the same is true in this case. The Ninth Circuit refused to allow NFRC to "bootstrap" its purely economic interest – a "tenuous" and "universal" one at best – into intervention on the side of the government in this NEPA case. *Accord, Wade v. Goldschmidt*, 673 F.2d 182, 184-85 (7th Cir. 1982) (per curiam).

Nor is there any other case to the contrary. Neither this Court nor any other has ever held that an applicant for intervention on the side of the government in litigation involving the enforcement of public laws may rely solely on a potential economic interest in the outcome of

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[4] Moreover, the court discussed *NRDC* at some length, *id.* at 850 n. 3, explaining that the case illustrates the "fact dependence" of Rule 24, and that the facts in *NRDC* involved much more than a mere economic interest.

the case to satisfy Rule 24(a)(2). Rather, as this Court has made clear, Rule 24(a)(2) requires a "significantly protectable interest." *Diamond*, 476 U.S. at 68; *Donaldson*, 400 U.S. at 531. Yet, if NFRC's asserted interest in this case supported intervention of right, Rule 24(a) would be so broad as to let every party into every case that could affect its "interests," no matter how far removed from the zone of interests of the statutory schemes at stake.

The only property or "transaction" at issue in PAS' NEPA claim is a decision by the state director of the BLM not to prepare a supplemental EIS addressing the impacts of old-growth logging on the northern spotted owl. NEPA imposes obligations only on federal agencies.[5] It does not mention or apply to private citizens in any way. Although NFRC might benefit financially from BLM's *violations* of NEPA, an economic interest in statutory noncompliance should not provide the basis for intervention of right under Rule 24(a)(2).

Both the Tenth Circuit and the Ninth Circuit agree that

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[5] In this respect NEPA differs from most other federal laws, which regulate conduct of private parties and are administered by federal agencies. NEPA regulates the conduct of federal agencies themselves, and is "administered" by the Council on Environmental Quality ("CEQ") and the vigilance of private citizens who may seek judicial review of agency compliance with NEPA pursuant to the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 702-706.

> "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."

Portland Audubon Society v. Hodel, Pets' App. A at A-15-16; *Rosebud*, 644 F.2d at 850 n.3. Both Circuits agree that a private party cannot rely solely on a mere pecuniary interest in the outcome of litigation to justify intervention as of right on the side of the federal government. NFRC's asserted interest falls outside of any "practical guide" under *any* Circuit's reasonable test for intervention, and therefore fails to satisfy Rule 24.

In short, the conflict between the Circuits posited by NFRC on this point does not exist.

III. ECONOMIC INTERESTS HAVE NO RELATION TO THE INTERESTS INTENDED TO BE PROTECTED BY THE NATIONAL ENVIRONMENTAL POLICY ACT

NFRC asserts that the Ninth Circuit's conclusion that NEPA does not provide protection for purely economic interests "is contrary to the clear intent and language of the act." Petition at 13. NFRC cites no case in support of this bald assertion, and, in fact, NFRC is simply wrong.[6]

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[6] The assertion is not only wrong, it turns NEPA completely on its head. NEPA was adopted specifically to *counter* agency tendencies to consider only economic consequences of their actions. The language of NEPA quoted by NFRC in support of its argument that NEPA was intended to "protect" economic interests actually means something quite different than NFRC infers. NEPA section 102 provides, in pertinent part:

(Continued on following page)

Every federal court that has addressed the issue has concluded that the type of purely pecuniary interests asserted by NFRC in this case fall outside the zone of interests established by NEPA, and that parties asserting only such interests therefore lack standing to bring a NEPA lawsuit themselves. *See City of Evanston v. Regional Transportation Auth.*, 825 F.2d 1121, 1126 (7th Cir. 1987) (denying standing to the City of Evanston, its mayor, and

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(Continued from previous page)

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall –
>
> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;
>
> (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations. . . .

42 U.S.C. § 4332. NFRC seizes upon and emphasizes the phrase "along with economic and technical considerations," as if that phrase somehow created a right or interest that NFRC may enforce. Petition at 14. But of course the emphasized phrase merely recognizes that there are *other* statutes that impose "economic and technical considerations" on federal agencies, and provides that NEPA is now adding an *additional* layer of consideration – one concerned *exclusively* with the *environmental* consequences of agency actions.

two aldermen who failed to allege "some distinct injury in fact to their *environmental* interests"), *cert. denied*, 108 S.Ct. 697 (1988); *Churchill Truck Lines, Inc. v. United States*, 533 F.2d 411, 416 (8th Cir. 1976) (plaintiffs "whose sole motivation . . . was their own economic self-interest and welfare, are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's *environmental* interest"); *Port of Astoria, Oregon v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979) (denying standing based purely on "only pecuniary losses and frustrated financial expectations"); *Pacific Northwest Bell Tel. Co. v. Dole*, 633 F.Supp. 725, 727 (W.D.Wa. 1986); *Basin Electric Power Cooperative v. Department of Public Serv. Reg.*, 608 F.Supp. 772, 774-75 (D.Mont. 1985) (denying standing based on "increased electric rates"); *American Motorcyclist Ass'n v. Watt*, 534 F.Supp. 923, 933 (C.D.Cal. 1981), *aff'd on other grounds*, 714 F.2d 962 (9th Cir. 1983); *Presidio Bridge Co. v. Secretary of State*, 486 F.Supp. 288, 294 (W.D.Tex. 1978); *Clinton Comm'y Hosp. Corp. v. Southern Maryland Med. Ctr.*, 374 F.Supp. 450 (D.Md. 1974) (denying standing despite "real injury" resulting from building of a competing hospital), *aff'd*, 510 F.2d 1037 (4th Cir.), *cert. denied*, 422 U.S. 1048 (1975); *Zlotnick v. Redevelopment Land Agency*, 2 ELR 20235, 20236 (D.D.C.) (standing denied plaintiffs who "can at best claim only a remote, insubstantial, highly speculative and ephemeral interest in the environment"), *aff'd*, 494 F.2d 1157 (D.C.Cir. 1972). In short, NFRC fails to raise any significant question of federal law for this Court to resolve.

CONCLUSION

PAS does not dispute that the federal courts in other cases have differed over the proper relationship between Rule 24(a)(2) and Article III. But this case does not present an appropriate vehicle for resolving that dispute, since – despite NFRC's arguments – the Ninth Circuit specifically declined to adopt an independent standing requirement for intervention. Moreover, the purported conflict between this case and the Tenth Circuit's 11-year old ruling in *NRDC* simply does not exist, and is not supported by later caselaw in the Tenth Circuit. Finally, the federal courts are unanimous that purely economic interests do not support standing under NEPA.

In short, the petition for certiorari should be DENIED.

Respectfully submitted,

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NORTHWEST FOREST RESOURCE COUNCIL,

Petitioner,

v.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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PETITIONER'S REPLY BRIEF

I

THIS *IS* AN APPROPRIATE CASE FOR THE COURT TO DETERMINE THE RELATIONSHIP BETWEEN RULE 24 INTERVENTION AND ARTICLE III STANDING

It is the petitioner's unequivocal position that the Ninth Circuit, in the opinion below, has erroneously equated the intervention standard under Rule 24(a)(2) with standing under Article III. Respondents seek to refute this view of the Ninth Circuit decision with a disingenuous argument that relies on a less than frank

presentation of that court's opinion. *See* Opinion at 4-5. Respondents cite only part of the court's footnote that addresses this issue for their position that the court has not incorporated an independent standing inquiry into the circuit's intervention test. *Id.*

A complete reading of the footnote, however, puts the record straight and reveals what the court has in fact decided. That portion of the footnote which respondents neglected to cite reads:

> "However, the standing requirement is at least implicitly addressed by our requirement that the applicant must 'assert an interest relating to the property or transaction which is the subject of the action.' " Petition Appendix at A-15.

The Ninth Circuit has implicitly required Article III standing status for intervention as of right. But respondents ask this Court to look only at the form of the decision below so as to deter it from seeing the substantive result of the case. *See* Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (Opposition) at 5. The Ninth Circuit denied petitioner the right to intervene to argue National Environmental Policy Act (NEPA) issues because, in the words of the court, petitioner's economic claim "has no relation to the interests intended to be protected by the statute at issue – in this case, NEPA." *See* Petition at Appendix A-18. The only protectable intervention interest the court found under this environmental statute was an environmental interest. However, if petitioner had asserted a legitimate environmental interest, petitioner would have had *standing* to enter the case. Obviously, the Ninth Circuit has equated intervention with standing.

Ironically, the respondents' opposition verifies that this was the intention of the court. Respondents cite no less than nine circuit cases on *standing* under NEPA for their proposition that an economic interest is not a protectable *intervention* interest. *See* Opposition at 10-11. This is the same *standing* argument that respondents made to and which was accepted, in principle, by the Ninth Circuit.

In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), this Court made it clear that Article III standing requires an injury with a nexus to the substantive character of the statute at issue. The Ninth Circuit's intervention standard under Rule 24 requires no less. This case, therefore, cries out for review.

Respondents referred to, and agreed with, this Court's conclusion in *Diamond v. Charles*, 476 U.S. 54, 68-69 n.21 (1986), that the various Courts of Appeals "have reached varying conclusions as to whether a party seeking to intervene as of right must himself possess standing." *See* Opposition at 4-5. It would be anomalous for this Court to reach such a conclusion and then refuse to address the issue when it is squarely presented, as in this case.

This invidious Ninth Circuit decision not only underscores the anomalous decisions of the Courts of Appeals but, by virtue of its implicit rather than explicit holding, it intensifies the need for this Court to clarify what has become a confusing and uncertain, but undeniably important, area of the law.

Besides the need that exists for this Court to resolve the conflicting precedents of the Courts of Appeals, there is a strong public policy reason for the Court to address this issue now. This Ninth Circuit decision, among other circuit decisions, unfairly and unjustifiably denies industry and citizen groups even a chance to protect their legitimate interests in most environmental litigation. Ironically, those who may suffer the greatest personal loss and whose lives are the most directly and inalterably changed by the outcome of the case are denied a voice that even the birds and the trees are granted. Surely this draconian limitation on citizen rights is not a just or desirable result.

II

THERE *IS* A CLEAR CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE REQUIREMENT FOR RULE 24 INTERVENTION MUST BE THE SAME AS ARTICLE III STANDING

As previously noted above, respondents have already acknowledged, along with this Court, the very real conflict among the Courts of Appeals on the intervention versus standing issue. *See Diamond v. Charles*, 476 U.S. at 62 n.21. But respondents refute that there is a conflict between the Ninth and Tenth Circuits. Contrary to its plain language, respondents argue that the Tenth Circuit's decision in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 578 F.2d 1341 (10th Cir. 1978), does not stand for what petitioner says it does. *See* Opposition at 6.

Unfortunately, respondents have misrepresented petitioner's position in this case and its interpretation of

Natural Resources. *See* Opposition at 5-9. Petitioner does not believe nor has it argued, as respondents suggested it had, that a mere economic interest standing alone is enough to satisfy Rule 24(a)(2). *See* Opposition at 6. Rather, the position taken by petitioner is that if all the other elements of Rule 24(a)(2) are met, an economic interest is a sufficient protectable interest to warrant intervention. Petitioner's understanding of *Natural Resources*, quoted only in part and out of context by respondents in their Opposition at 6, is that "the Tenth Circuit found that a decision in favor of plaintiffs could have a substantial [economic] effect on the applicants and that satisfied the interest test." Petition at 7.

Petitioner has not taken the extreme position erroneously ascribed to it by respondents. Petitioner agrees that such a position would indeed be absurd. However, respondents and the Ninth Circuit have taken an extreme position. They are of the opinion that even when all other elements of Rule 24(a)(2) are met, an economic interest will never be a sufficiently protectable interest to warrant intervention in a NEPA, or any other, environmental case. *See* Opposition at 5-9. This position, contrary to petitioner's, *is* absurd.

Clearly, petitioner would have received different treatment in the Tenth Circuit under *Natural Resources* than it did in the Ninth Circuit in this case. In the Tenth Circuit petitioner's timber lease interest would have been held a protectable interest like that of the American Mining Congress' mineral license interest. But respondents assert without explanation that the Tenth Circuit has

more recently rejected this concept of a protectable interest in the case of *Rosebud Coal Sales Co. v. Andrus*, 644 F.2d 849 (10th Cir. 1981). *See* Opposition at 6.

That is simply not true. In *Rosebud* the Tenth Circuit *reconfirmed* its decision in *Natural Resources* that a lease interest is a protectable interest under NEPA. *Id.* at 850-51 n.3. The facts of *Rosebud* were entirely unlike the facts either in *Natural Resources* or in this case. In *Rosebud* the movant sought to intervene in a contract dispute between the government and a lessee. But the court found that the movant had no privity of contract and could not, therefore, intervene. The government had not been challenged, as in the present case, for failure to comply with a statute. The case is grossly inapposite.

A more recent and more apposite Tenth Circuit case is *Sanguine, LTD. v. United States Department of Interior*, 736 F.2d 1416 (10th Cir. 1984). This case involved a challenge by an oil and gas exploration company against the government for failure to comply with specified lease terms on restricted Indian lands. Certain Indian landowners moved to intervene to protect their economic interest derived from the leasing of their lands for exploration and mineral production. After finding that the potential intervenors had met all of the other elements for Rule 24(a)(2) intervention, the court referred to *Natural Resources* as a similar situation and ruled that the intervenors' economic interest *was* a protectable interest. *Id.* at 1420.

In the present case, the Ninth Circuit found that petitioner met all of the elements of Rule 24(a)(2) intervention with the exception of a protectable interest. This

is evidenced by the fact that the Ninth Circuit allowed petitioner to intervene in the case but restricted petitioner from arguing the NEPA issues and the fact that the court discussed only the protectable interest element in its decision. *See* Petition Appendix at A-14-18. Clearly, had the Ninth Circuit followed the Tenth Circuit view that "[t]he 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process," *see Sanguine*, 736 F.2d at 1420, the Ninth Circuit would have granted petitioner leave to intervene as of right. But the Ninth Circuit has only given lip service to this policy which underlies the "interest" requirement of Rule 24(a)(2). By refusing to put this policy into practice the Ninth Circuit has put itself squarely at odds with the Tenth and other circuits. This condition necessitates review by this Court.

III

NEPA *IS* INTENDED TO PROTECT ECONOMIC INTERESTS

Respondents claim that NEPA is concerned "exclusively with the environmental consequences of agency actions." *See* Opposition at 10 n.6. This claim is false. Not only is this claim without judicial or legislative support, but it contradicts the clear and unambiguous language of the statute and its implementing regulations.

NEPA requires, by its terms, that a variety of factors be taken into account and that there be a balancing of environmental and other values in the environmental impact statement process. The very provision relied upon

by respondents to argue the contrary states with certainty that environmental values must be considered "in decisionmaking *along with economic* and technical considerations." 42 U.S.C. § 4332(b) (emphasis added).

Respondents have not in any way contradicted the other provisions of NEPA which state with equal or greater clarity that economic interests are as much a value to be protected by NEPA as the environment.

> "The Congress . . . declares that it is the continuing policy of the Federal Government . . . to foster and promote the *general welfare*, to create and maintain conditions under which man and nature can exist in *productive* harmony, and fulfill the social, *economic*, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331(a) (emphasis added).

Lest there be any doubt about the true purpose of NEPA, the Council on Environmental Quality has promulgated regulations which require the consideration of economic and social effects of agency actions.

> "When an environmental impact statement is prepared and economic or social and natural or physical effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment." 40 Fed. Reg. 1508.14 (in part).

The claim by respondents that NEPA is intended to protect environmental values to the exclusion of all other interests, even economic, simply flies in the face of the plain meaning of the statute and defies common sense. *See* Opposition at 10 n.6. NEPA protects both environmental values *and* economic values. It mandates that these competing interests be balanced. The true balancing

purposes of NEPA cannot be realized unless and until petitioner, the sole representative of economic interests, is allowed to intervene.

CONCLUSION

The challenged opinion and the pleadings filed by each side suggest a legitimate and urgent need for this Court to review and correct this unfair and damaging precedent. For these reasons the Court should grant the Writ of Certiorari petitioned for.

DATED: June, 1989.

Respectfully submitted,

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No. 88-1751

In The

Supreme Court of the United States

October Term, 1988

NORTHWEST FOREST RESOURCE COUNCIL,

Petitioner,

v.

PORTLAND AUDUBON SOCIETY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Mountain States Legal Foundation (MSLF or Foundation) hereby respectfully moves to file the attached brief *amicus curiae* in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

The interest of the Foundation in this case arises from the fact that many MSLF members hold economic interests of the type that were denied intervention of right in the present case. Intervention in such cases is one of the

principle ways in which the Foundation serves its public interest goal of defending the free enterprise system in the western states. The Foundation's interests are further detailed in the attached brief.

The Foundation's intervention to protect economic interests in numerous environmental cases gives it special insight into the importance of the decision below. This insight should be considered by this honorable Court in making the decision to grant the petitioned writ.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

The Mountain States Legal Foundation (MSLF or the Foundation) respectfully submits this brief *amicus curiae* in support of the Northwest Forest Resource Council, the Petitioner for certiorari.

INTEREST OF AMICUS CURIAE

The Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private

property rights, and the free enterprise system. The Foundation is particularly active in western public land and natural resource issues.

Foundation members include businesses and individuals who earn their living on the public lands or who otherwise depend for their economic well-being upon those who do. The timber, minerals, forage, water, and other resources used by MSLF members are managed under the land management and environmental statutes of the United States. The allocation of these resources, upon which the livelihoods of MSLF members depend, are often the subject of litigation under environmental statutes including the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4331-34 (1982).

In the past, when environmental suits have threatened the livelihoods of MSLF members, they have intervened in court proceedings to protect those economic interests. In many proceedings, MSLF has represented its members, in other proceedings MSLF members have defended their livelihoods through private counsel.

MSLF has intervened in cases brought under environmental statutes, including NEPA, in numerous civil actions, including but not limited to, the following cases: *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987), *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), *cert. denied*, ___U.S.___ (1989), *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D. Cal. 1985), *Natural Resources Defense Council v. Hodel*, Civil No. 5-86-0548 EJG (E.D. Cal.), *Animal Defense Council v. Hodel*, 840 F.2d 1432 (9th Cir. 1988), and *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985).

The Ninth Circuit's denial in *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), of the right to intervene to protect economic interests in litigation brought under NEPA will have a profound effect on numerous kinds of private activity. While the Foundation is interested in many of these areas, this *amicus* brief will primarily address the example of environmental litigation affecting the public lands. It is in this area that the Foundation has demonstrated its preeminence.

STATEMENT OF THE CASE

Amicus Curiae adopts Petitioner's statement of the case.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DECISION STRIPS WESTERN PUBLIC LAND USERS OF THE RIGHT TO DEFEND THEIR LIVELIHOODS AGAINST SUITS BROUGHT UNDER NEPA

The present case arises out of a federal agency action affecting the public lands of the United States. The Court should be aware that the public lands are mostly productive lands that are the basis of the livelihoods of millions of Westerners. Ranchers have built family ranches on the basis of the availability of federal forage. Loggers have relied on federal timber for generations. Energy companies and individual wildcatters have spent millions of dollars and decades exploring the public lands of the West to develop the various energy reserves with which

those lands abound, including, but not limited to oil, gas, coal, geothermal, oil shale, and tar sands. Mineral companies and private individuals have spent hundreds of millions of dollars and over one hundred years exploring for and developing vitally needed – for defense for example – mineral resources, including but not limited to, silver, lead, zinc, gold, cobalt, copper, beryllium, and rare earths. Finally, communities have been built around these activities, communities which derive their water from rivers and streams which flow across the public lands.

In the eastern states, the federal government sold the public lands to private individuals. Those lands became the economic base of that part of the country that lies east of the one hundredth meridian. In the West, the situation was different. The lands were retained by the federal government, and federal law provided for the economic utilization of the public lands. Westerners built their economy around those public land laws. In light of that history, it would be unfair now to disallow Westerners from intervening to represent the same kinds of economic interests that can be protected in the East.

When environmental issues came to the forefront in the sixties and seventies, the economic activities on the public lands were subjected to federal laws requiring consideration of environmental concerns. Those environmental laws, including NEPA, became the bases for injunctions which stopped or hindered the resource utilization and the economic well-being of Westerners. *See, e.g., National Wildlife Federation v. Burford,* 835 F.2d 305 (D.C. Cir. 1987).

The present case presents a classic example of the extreme unfairness of the Ninth Circuit's rule. The spotted owl controversy and the associated litigation stand to cost Pacific Northwest timber communities tens of thousands of jobs directly and hundreds of thousands of jobs indirectly. Numerous sawmills have closed already. The men and women who depend on the public lands will be devastated.

In this case, public land users do not ask that the Court protect their economic use, all they ask is that they be allowed to go to court and argue for proper application of environmental statutes, statutes that if improperly applied will cause them grievous harm.

It is not enough to say that the federal government represents land users. This is simply not the case. Federal land managers have a myriad of conflicting duties, including duties to develop resources and to protect the environment. Only the public land users can truly represent their own interests.

Separate representation of public land users is not an insubstantial matter. An example is the ongoing case of *National Wildlife Federation v. Burford*, 835 F.2d 305 (D.C. Cir. 1987) (ruling on appeal of preliminary injunction). In that case, the Foundation, representing public land users, challenged the National Wildlife Federation's standing to sue under NEPA to set aside an entire general purpose government program. Initially, the federal government failed to make this argument. The Foundation advanced the argument and eventually prevailed at the district court.[1]

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[1] The district court decision is currently on appeal.

Similarly, the Foundation's arguments influenced the course of grazing fee litigation in *Natural Resources Defense Council v. Hodel,* Civil No. 5-86-0548 EJG (E.D. Cal.). In that case, ranchers across the country could have been forced to pay significantly more for grazing rights on the public lands. Many stood to lose the economic viability of their ranches because of the increased fees that would be paid to the government. Only the intervention of ranchers represented by MSLF permitted the ranching interests directly affected by the litigation to be adequately represented.

Those with the most at stake in environmental litigation are those whose livelihoods depend on the resources affected by environmental lawsuits. To hold, as the Ninth Circuit did, that the environmental laws only protect the "environment" and do not give other resource users any right to defend their livelihoods is unfair. "Environmental" laws are really "resource" laws, and to bar the right of resource users to litigate under them is an artificial and politically based distinction that has no place in the courts.

II. THE NINTH CIRCUIT DECISION GIVES FEDERAL LAND MANAGERS THE OPPORTUNITY TO UNILATERALLY DISPOSE OF WESTERNERS' LIVELIHOODS

In the past few years, the federal government has been willing to defend private utilization of resources on the public lands. However, this may not always be the case. The decision of whether or not to prosecute a lawsuit is within the discretion of the government. If the government chooses to abandon the interests of public

land users, then land users will be powerless to do anything about it. A right of intervention is essential to prevent, or at least impede sweetheart lawsuits from threatening public land user rights.

An example of the potentially devastating effect of the government abandoning its interest came in *National Wildlife Federation v. Burford*, noted above. Initially, the government's attorneys admitted alleged environmental procedural errors, errors that did not exist. The result was imposition of a preliminary injunction blocking land use. Had the government not reversed this position and asserted – correctly – that no errors had been made, and had MSLF not been allowed to intervene, thousands of individual property rights in the public lands affecting thousands, if not millions, of Westerners, could have been declared void.

It is not hard to imagine what would happen in an administration that drew large numbers of its officials from the environmental organizations that are currently litigating public land issues. Sweetheart lawsuits could devastate the western economy. Those who stood to lose their jobs and ability to earn a living could only look on helplessly as federal officials declined to defend themselves against lawsuits detrimental to the livelihoods of Westerners. While that situation may occasionally happen even if intervention is allowed, it is far less likely where public land users are able to intervene on behalf of their economic interests and be present in court to argue the merits of the case.

III. THE NINTH CIRCUIT DECISION DENIES PARTICIPATION TO THOSE WHO KNOW THE MOST ABOUT THE PUBLIC LANDS

The substance of NEPA litigation relates to arguments over the impact on natural resources. In many instances, those resources are under the stewardship of public land users. For example, in the case of grazing and forage, no one knows more about the condition of the range than ranchers. They live upon the land and visit the range most often. They know how much animals eat. They must plan so that there is forage in the future.

The Ninth Circuit's rule would allow urban based environmental groups to argue with the federal government about the status of a rancher's forage. The very people who are the closest to the land could be precluded from arguing in court.

CONCLUSION

The Court should recognize that improper application of environmental statutes has the potential to seriously harm the livelihoods of millions of Westerners. Environmental statutes are really resource statutes, and resource users must be allowed to participate in litigation under those statutes. For that reason and the reasons stated above, the intervention of the Northwest Forest Resource Council to argue questions of application of

NEPA should have been granted. Accordingly, this honorable Court should grant the writ of certiorari and reverse the ruling below.

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